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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 492

FOX RIVER PAPER COMPANY, PATTEN PAPER COMPANY, LIMITED; APPLETON WOOLEN MILLS, ET AL., PLAINTIFFS IN ERROR,

vs.

RAILROAD COMMISSION OF WISCONSIN

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JULY 8, 1926

(32,059)

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[fol. 1] **IN SUPREME COURT OF WISCONSIN**

WRIT OF ERROR—Filed June 4, 1926

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Wisconsin before you or some of you, being the highest court of law or equity of the said state of Wisconsin, in which a decision could be had in the suit between Fox River Paper Company, the Patten Paper Company Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company, plaintiffs and appellants vs. Railroad Commission of Wisconsin, Defendant and Respondent, and wherein was drawn in question the validity of certain statutes of said State of Wisconsin and also of an authority exercised under said statutes on the ground of their being repugnant to the constitution and laws of the United States and the decision was in favor of their validity, and wherein rights, privileges and immunities were claimed under the Constitution of the United States and the decision was against a right, privilege and immunity specially set up and claimed under the Constitution of the United States, a manifest error hath happened to the great damage of the Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company, as by its petition appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and procedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

[fol. 2] the same in said Supreme Court at Washington, D. C., within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States this 4th day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six (1926).

H. C. Hale, Clerk of the District Court of the United States for the Western District of Wisconsin. H. C. Hale. (Seal of U. S. District Court, Western Dist. of Wisconsin, Madison.)

Allowed by me this 4 day of June, 1926. A. J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal of Supreme Court of Wisconsin.)

STATE OF WISCONSIN, ss:

SUPREME COURT

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 3] [File endorsement omitted.]

[fol. 4] IN SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF ERROR—Filed June 4, 1926

To the District Court of the United States for the Western District of Wisconsin:

The petition of Fox River Paper Company, The Patten Paper Company Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, respectfully shows:

That petitioners are the owners of an existing dam across the Fox River at the city of Appleton, Outagamie County, Wisconsin, which dam was built in 1878 and has been maintained ever since, and that petitioners on the 21st day of May, A. D. 1925, presented to the Railroad Commission of Wisconsin their application for a permit to rebuild, maintain and operate said dam under Section 31.07 of the Wisconsin Statutes.

That thereafter and on the 25th day of May, A. D. 1925, said Railroad Commission of Wisconsin refused to entertain said petition on the ground that it was without jurisdiction to entertain the same and dismissed said application without prejudice on the ground that the proposal required under Subsec. (3) of Section 31.09, Wisconsin Statutes was omitted therefrom.

That thereafter petitioners duly commenced an action in the Circuit Court for Dane County, Wisconsin, against said Railroad Commission of Wisconsin, in which they asked judgment of the said court directing said Railroad Commission of Wisconsin to take jurisdiction of said application and fix a time for a public hearing thereon and to proceed to a final determination as provided by the statutes of said state of Wisconsin, and that said Railroad Commission of Wisconsin, in its answer to the complaint of petitioners, alleged that petitioners did not file with said application the proposal required under Subsec. (3) of Section 31.09, Wisconsin Statutes, and that therefore said application did not state facts sufficient to give jurisdiction to the Railroad Commission of Wisconsin, and that a demurrer to said answer was interposed by the petitioners and that said demurrer was overruled by said Circuit Court for Dane County, and judgment was entered by said Circuit Court [fol. 5] for Dane County dismissing the complaint of petitioners.

That thereafter an appeal from said judgment of the Circuit Court for Dane County, Wisconsin, was taken to the Supreme Court of Wisconsin, where the judgment of the Circuit Court for Dane County, Wisconsin was affirmed.

That petitioners maintain that the Supreme Court of the State of Wisconsin erred in holding that Subsec. (3) of Section 31.09 Wisconsin Statutes for 1925 is valid, the validity of said Subsection having been denied and drawn

in question by petitioners in their complaint in said action against the Railroad Commission of Wisconsin on the ground that it was repugnant to the constitution of the United States, and that said Subsection is in violation of Article V of the Constitution of the United States and that under the provisions of said Subsection, petitioners are deprived of property without due process of law in violation of Section 1, Article XIV of the Constitution of the United States.

Wherefore petitioners pray that a Writ of Error may issue from this court directed to the Supreme Court of the State of Wisconsin directing that all the records and proceedings in the Supreme Court of the State of Wisconsin be transmitted to the Supreme Court of the United States so that the Supreme Court of the United States may take such proceedings as may be necessary to correct such error according to the laws and customs of the United States.

John F. Kluwin, Attorney for Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company. Moses Hooper, of Counsel.

[fol. 6] [File endorsement omitted.]

[fol. 7] IN SUPREME COURT OF WISCONSIN

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, Plaintiffs and Appellants,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendant and Respondent

ORDER ALLOWING WRIT OF ERROR—Filed June 4, 1926

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Wisconsin, in rendering judgment against them in the above entitled case, the plain-

tiffs and appellants hereby pray a Writ of Error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

Assignments of error are herewith presented and filed.

John F. Kluwin, Attorney for Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company. Moses Hooper, of Counsel.

STATE OF WISCONSIN, ss:

SUPREME COURT

Let the Writ of Error issue upon the execution of a bond by Fox River Paper Company, the Patten Paper Company, [fol. 8] Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company to the Railroad Commission of Wisconsin, in the sum of One Thousand Dollars; such bond when approved to act as a supersedeas.

Dated this fourth day of June, A. D. 1926.

A. J. Vinje, Chief Justice of Supreme Court of Wisconsin. (Seal of the Supreme Court of Wisconsin.)

[fols. 9-11] [File endorsement omitted.]

[fol. 12] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 4, 1926

Now come the above plaintiffs and file herewith their petition for a Writ of Error and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments:

1. The Supreme Court of the State of Wisconsin erred in holding that sub-section 3 of section 31.09 of the Statutes of Wisconsin of 1925 is valid. The validity of said section was denied and drawn in question by plaintiffs on the ground that it was repugnant to the Constitution of the United States and in contravention thereof.

2. That the Supreme Court of the State of Wisconsin erred in holding and deciding that said section does not violate Article V of the Constitution of the United States.

3. That the Supreme Court of the State of Wisconsin erred in holding that said section does not deprive the plaintiffs of property, without due process of law as guaranteed by section I of Article XIV of the Constitution of the United States.

[fol. 13] 4. The Supreme Court of Wisconsin erred in affirming the decision of the Circuit Court of Dane County, Wisconsin, in failing to reverse said decisions with directions to said court to enter judgment according to the prayer of plaintiffs' complaint.

For which errors, the plaintiffs, Fox River Paper Company, The Patten Paper Company Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, pray that the said judgment of the Supreme Court of the State of Wisconsin, rendered herein on the 6th day of April, A. D. 1926, be reversed, and a judgment be rendered in favor of the plaintiffs herein and for costs.

John F. Kluwin, Attorney for Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company. Moses Hooper, of Counsel.

[fols. 14-23] [File endorsement omitted.]

[fol. 24] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, Plaintiffs,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendants

BILL OF COMPLAINT—Filed January 16, 1926

Plaintiffs complain of defendant for this, that

On May 13, 1925, plaintiffs presented to the Railroad Commission, defendants, their application, of which a copy is hereto annexed marked Exhibit A, for a certificate that the construction, operation and maintenance of the so-called Middle Dam across the Fox River in the City of Appleton does not materially obstruct existing navigation, or violate other public rights, and will not endanger life, health or property, and will not do so if rebuilt according to the plans and specifications made a part of said application, all the allegations of which application are true.

On May 15, 1925, said Railroad Commission adjudicated respecting said application:

"From an examination of the application and from other investigations hereinafter pointed out, the Commission finds:

That the application states the facts required to be stated under Section 31.13, except those required by subsection (b) thereof, namely, 'If constructed by legislative permission, a statement of the act of the legislature authorizing the same.' In fact, the application under Subdivision (e) affirmatively shows that the dam was built without any legislative authority. It moreover appears from the records in the office of the Commission, as well as from an examination of the acts of the State Legislature of Wisconsin since the organization of the state that the dam in question was built without legislative permission, was never legalized under Section 31.07 or under any other provision

of law, but that on the contrary it has existed since its construction and still exists as an illegal structure.

That the application does not state facts sufficient to give jurisdiction to the Commission to issue a permit to the [fol. 25] applicant under Section 31.13 of the Statutes.

The Commission further finds that the application also states the facts required to be stated under Section 31.05 of the statutes for a permit to construct a dam, but does not comply with the further requirement of the statutes that each applicant for a permit under Section 31.05 of the statutes shall file with his application for a permit the proposals under Subdivision (1), (2) and (3) of Section 31.09, in that the proposal required under Subsection (3) of Section 31.09 is omitted.

That the application does not comply with the requirements of the statutes so as to give jurisdiction to the Commission to issue a permit to construct a dam under Section 31.05 for the reason that the applicants have not fully complied with Subsection (3) of Section 31.09 of the statutes.

The Commission further finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice."

On May 21, 1925, plaintiffs renewed their said application in the following language, to-wit:

"To the Honorable the Railroad Commission of Wisconsin:

Now come the applicants, by their attorneys and counsel, and renew the application filed with you on May 13, 1925, with the understanding that it is for a permit to operate and maintain an existing dam under Section 31.07 of the Statutes of Wisconsin.

May 20, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Applicants. Moses Hooper, of Counsel."

On May 25, 1925, said Railroad Commission reexamined the application and found and determined

"that the application states the facts required to be stated under section 31.07, Statutes, for an application for a permit to operate and maintain an existing dam which was constructed in or across a navigable stream without leg-

islative authority, but that the application does not comply with the further requirements of the statute that each applicant for such permit shall file with his application the proposals under subdivisions (1), (2) and (3) of section 31.09, in that the proposal required under subsection (3) of said section 31.09 is omitted therefrom.

Hence the Commission finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice."

By such adjudication and determination of the defendant, and its refusal to proceed to a public hearing upon such application as provided by Statute, or to take evidence in respect to the same, these plaintiffs are deprived of the legal and proper use of their said water power in violation of [fol. 26] Article V of the Federal Constitution which provides that

"No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation,"

and in violation of the provisions of the XIV amendment of the Federal Constitution expressed in the following words:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"

and in violation of the 13th section of Article I of the State Constitution, which provides that "the property of no person shall be taken for public use without just compensation therefor."

Wherefore these plaintiffs pray judgment of this Court directing the said Railroad Commission to take jurisdiction of such application and fix a time and place for a public hearing thereon, and proceed thereon to final determination as provided by the Statutes of Wisconsin.

Dated July 10th, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Plaintiffs. Moses Hooper of Counsel.

[fol. 27] EXHIBIT A TO BILL OF COMPLAINT

Filed Jan. 16, 1926. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

BEFORE THE WISCONSIN RAILROAD COMMISSION

In the Matter of the Application of THE FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE COMPANY, THE VALLEY IRON WORKS, and THE APPLETON MANUFACTURING AND LUMBER COMPANY for Permission to Rebuild, Operate, and Maintain the So-called Middle Dam

To the Honorable the Railroad Commission of Wisconsin:

The Fox River Paper Company, the Patten Paper Company Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works and the Appleton Manufacturing and Lumber Company, all Wisconsin corporations, hereby make application for permission, pursuant to the provisions of Chapter 31 of the Wisconsin Statutes of 1923, to rebuild, operate and maintain the so-called Middle Dam.

For the purpose of this application, said corporations, petitioners, respectfully show to your Honorable Body that

(a) This dam is constructed in and across the Fox River extending from the head of Grand Chute Island in Section 35 south of the river, Town 21 North of Range 17 East, of the Fourth Principal Meridian, to Lot 2 in Section 26, said Town and Range, north of the river.

(b) Your applicant, the Fox River Paper Company, is the owner of the land on which said dam rests on both sides of the river and of the land below the same on which it is the purpose of your petitioners to rebuild said dam.

(c) The original dam was built in the year 1877 and completed in the year 1878 and as said dam was built and as the same has since been maintained and operated, it raises the level of the water in the pond above said dam in ordi-

nary stages to the point 721.37 feet above mean low tide [fol. 28] at New York City.

(d) The total length of said dam is 373 feet 4 inches. The overflow section is 91 feet 6 inches long. The crest thereof is elevation 721.37 feet above mean tide at New York City. There are in the same eleven sluiceway sections, each approximately 21 feet wide. The bottom elevation of each of which is approximately 4 feet 8 inches below the crest of the dam. Said sluiceways are operated by needles. The elevation of the crest of said dam referring to bench mark 60 B elevation 100, as fixed by the Railroad Commission on June 28, 1918, is 77.16 feet. Top of piers between the sluiceways two feet above the water surface, or 723.37 feet above mean low tide or 79.16 feet referring to bench mark 60 B elevation 100 as fixed by the Railroad Commission on June 28, 1918. This is a stone and wood crib dam.

The length of the dam to be rebuilt to replace this dam is intended to be 365 feet between abutment walls and 373 feet 4 inches including abutment walls. The crest of same is intended to be 721.37 feet above mean low tide at New York City. There are to be 16 sluiceways, each 20 feet wide. The elevation of the crest of the bottom of such sluiceways is intended to be 711.37 feet datum elevation mean tide at New York City, or 67.16 feet referring to bench mark 60 B elevation 100, as fixed by the Railroad Commission on June 28, 1918. It is intended to build same of solid concrete, elevation of top of piers between sluiceways two feet above the water surface, or 723.37 feet above mean low tide, or 79.16 feet referring to bench mark 60 B elevation 100, as fixed by the Railroad Commission on June 28, 1918. Head to be held at the dam about 8 feet, but a head of about 10 feet is made available by a headrace running down through Grand Chute Island.

(e) Said dam was originally built and has been ever since maintained as a mill dam for the purpose of furnishing hydraulic power for manufacturing purposes and is intended for such purpose in the future as rebuilt.

Same was built by the Appleton Water Power Company, said company supposing that it had authority from the State to build the same through its charter from the [fol. 29] State. The Articles of Association of said Apple-

ton Water Power Company recited as the object of its incorporation—

"First. The purpose for which this organization is formed is to construct a dam across the Fox river in the said city of Appleton and for improving and creating water powers, and river lots, on and near said water power and for holding and disposing of the same."

Its charter recited that—

"Whereas T. W. Brown, N. M. Edwards, Joseph H. Marston, Jackson Tibbits, Edward West and S. K. Wambold, have filed in the office of the secretary of state certain articles of association with a view to forming a corporation to be known as the Appleton Water Power Company and with a capital of twelve thousand dollars, for the purpose of constructing a dam across the Fox river in the city of Appleton, and for improving and creating water powers, river lots on and near said water power, and holding and disposing of the same, and have complied with the provisions of the statutes in such case made and provided, the state of Wisconsin does hereby grant unto the above named persons and their successors and assigns, full authority by and under their said name of Appleton Water Power Company to exercise the powers and privileges of a corporation for the purpose above stated and in accordance with their said articles of association and the laws of the state."

(f) The approximate amount of hydraulic power as developed by said dam is, at the ordinary stage of water, about 1500 horse power—more in a high stage of water and less in a low stage of water.

(g) The nearest city or village above said dam is the twin cities of Neenah and Menasha in the County of Winnebago, each of which is about five miles above the dam in question by way of the river, one of said cities being on one side of the river and the other of said cities being on the other side of the river.

The nearest city or village below said dam is the Village of Kimberly, which is by the course of the river about five miles below said dam.

The nearest existing dam across the Fox River above said dam is what is called the Grand Chute Dam, a large part of which is owned and maintained by the United

States, and a small part of which is owned and maintained by riparian owners, and which is about two thousand feet above the dam in question. Said dam lands on Lot 2 of Section 35, Town 21 North of Range 17 East of the Fourth Principal Meridian on the north side of the river and on [fol. 30] Lots 3 and 4 of said Section 35 on the south side of the river.

The nearest existing dam below said dam on said river is called the Telulah Dam. This dam is owned and maintained by the United States and is about four thousand feet below the dam in question by way of the river and reaches from Lot 1 Section 36 Town 21 North of Range 17 East of the Fourt- Principal Meridan on the south side of the river to a fraction of said Section 36 north of the river.

(h) Attached hereto and made a part of this application is a map on the scale of 250 feet to the inch showing the lands that may be affected by the rebuilding and enlargement and operation and maintenance of said dam and indicating the ownership of each tract of land that may be so affected.

(i) Said dam is weak from age and decay. Safety requires rebuilding or extensive repairs. Rebuilding by use of concrete seems preferable. If the dam is rebuilt, economy requires that the rebuilding be on a site twenty-five or fifty feet below the present site in order that the old dam may be available as a coffer dam.

(j) The rebuilding and enlargement of said dam in accordance herewith will not materially obstract navigation or violate other public or private rights or endanger life, health or property.

(k) At the site of said dam, the owners of the power on the south or east side of said river are entitled to draw for use for power the four-sevenths of the surplus flow of said river, after the withdrawal therefrom of the volume thereof required for navigation. See West vs. Fox River Paper Company, 82 Wis. 647, 654-5-6-7.

(l) (c. m. f. means cubic feet per minute). Your petitioners own and are entitled to draw for use for power from the pond held by said dam, subject to right to use for navigation, as follows:

The Appleton Woolen Mills is entitled to draw 2,974 c. m. f. when there is flowing in said river 10,112 c. m. f. and 1,487 c. m. f. more when there is flowing in said river 23,066 c. m. f. and 743 c. m. f. more when there is flowing in said river 162,770 c. m. f. and 1,112 c. m. f. more when there is flowing in said river 231,560 c. m. f.

[fol. 31] The Appleton Machine Company is entitled to draw 1,770 c. m. f. when there is flowing in said river 3,097 c. m. f. and 1,770 c. m. f. more when there is flowing in said river 13,709 c. m. f. and 885 c. m. f. when there is flowing in said river 15,257 c. m. f.

The Valley Iron Works is entitled to draw 2,975 c. m. f. when there is flowing in said river 167,975 c. m. f.

The Appleton Manufacturing and Lumber Company is entitled to draw 1,667 c. m. f. when there is flowing in said river 229,614 c. m. f.

Of the remaining flow of the water, your petitioner, Patten Paper Company, Limited, is entitled to the 69½% thereof and your petitioner, Fox River Paper Company is entitled to the 37½% thereof. See Kimberly-Clark Company vs. Patten Paper Company, 153 Wis., 69.

(m) The volume of the flow of the Fox River at the point of location of this dam is largely modified, increased or diminished, by the handling of the navigation storage basin of Lake Winnebago by the War Department of the United States in the interest of navigation.

(n) There is under consideration a proposition of the War Department to largely increase the flow of the river at the location of this dam by a plan for handling the storage of Lake Winnebago in the interests of navigation, conditioned that the Water Power Interests on the Lower Fox River will furnish a very considerable sum either as a principal sum or as an annual rental for such increased flow of water. If such plan is acted upon and carried out, it will very largely increase the flow of the river at the point of this dam, and thereby very largely increase the value of those parcels of water to be drawn for power under conditions of the larger flow of the water, while the same will not be at all to the advantage of those parties entitled to draw water for power under conditions of smaller flow. See

FOLD OUT IS TOO LARGE TO BE FILMED

House Doc. 146, 67th Congress, Second Session, pages 138 [fol. 32] to 141 inclusive.

Fox River Paper Company, (Sgd.) by Wm. C. Wing, President. Patten Paper Company, Limited, (Sgd.) by Juelson T. Rosebush, President. Appleton Woolen Mills, (Sgd.) by F. H. Haywood, President. (Sgd.) Appleton Machine Company, (Sgd.) by F. E. Saecker, President. Valley Iron Works, (Sgd.) by E. A. Peterson, President. Appleton Manufacturing and Lumber Company, (Sgd.) by E. P. Grigson, President.

[fol. 33] STATE OF WISCONSIN,
Outagamie County, ss:

W. C. Wing, being duly sworn, on his oath deposes and says that he is the President of the Fox River Paper Company, one of the applicants for permit as stated in the foregoing application. That he has read the foregoing application and knows the contents thereof. That each and every of such allegations is true as he is credibly informed and verily believes.

That the Fox River Paper Company is the owner in fee of the land on which petitioners ask to rebuild the dam referred to in such application.

Wm. C. Wing.

Subscribed and sworn to before me this 6 day of May, 1925. A. F. Kletzien, Notary Public, Outagamie County, Wisconsin. Commission expires Mar. 6, 1927. (Notarial Seal.)

(Here follow map showing property owners on upper level at middle dam and plans for rebuilding of middle dam, marked side folio pages 34 and 35.)

[fols. 36-39] STATE OF WISCONSIN:

BEFORE THE WISCONSIN RAILROAD COMMISSION

[Title omitted]

Now come the Fox River Paper Company, the Patten Paper Company Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company, being the applicants in the foregoing application for a permit to rebuild, operate and maintain the dam mentioned in such application, and to secure such permit, they and each of them does propose and agree

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicants or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

Fox River Paper Company, by Wm. C. Wing, President. Patten Paper Company Limited, by Judson G. Rosebush, President. Appleton Woolen Mills, by F. H. Harwood, President. Appleton Machine Company, by F. E. Saecker, President. Valley Iron Works, by E. A. Peterson, President. Appleton Manufacturing and Lumber Company, by E. P. Grignon, President.

[fol. 40] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ANSWER.—Filed in Circuit Court November 13, 1925; in Supreme Court January 16, 1926

Now comes the above-named defendant by Herman L. Ekern, Attorney General, C. A. Erikson, Deputy Attorney

General, Suel O. Arnold, Assistant Attorney General, its attorneys, and for answer to the complaint of the plaintiff admits, denies, and alleges as follows:

1. Defendant admits that on May 13, 1925, plaintiffs presented to the defendant Railroad Commission their application for a permit to construct, operate, and maintain the so called, middle dam in the Fox River under the provisions of Chapter 31 of the Statutes.

2. Defendant admits that on May 15, 1925, it dismissed the plaintiff's application.

3. Defendant admits that on May 21, 1925, the plaintiffs renewed their application.

4. Defendant admits that on May 25, 1925, it again dismissed the plaintiff's application.

5. Defendant denies that by reason of its refusal to proceed to a public hearing upon the said applications the plaintiffs are deprived of the legal and proper use of their said water power in violation of Article V of the Constitution [fol. 41] of the United States.

6. Defendant denies that by reason of its refusal to proceed to a public hearing upon the said applications the plaintiffs are deprived of the legal and proper use of their said water power in violation of the provisions of the XIV amendment to the federal constitution.

7. Defendant denies that by reason of its refusal to proceed to a public hearing upon the said applications the plaintiffs are deprived of the legal and proper use of their said water power in violation of Section 13 of Article I of the Constitution of the State of Wisconsin.

8. Further answering said complaint defendant alleges that said application, dated May 13, 1925, states facts required to be stated under section 31.13 of the Stats. for a permit to raise or enlarge an existing dam, except those required by subsection (b) thereof, namely, "If constructed by legislative permission, a statement of the act of the legislature authorizing the same." That said application in subsec. (c) thereof affirmatively shows that the dam was constructed without legislative authority. That the records in the office of the said defendant Railroad Commission

shows that said dam was constructed without legislative authority. That said dam was never legalized under the provisions of law. That said dam was at the time it was constructed, and still is, an unlawful structure. That said application does not state facts sufficient to give jurisdiction to the defendant Railroad Commission to issue a permit under said sec. 31.13 of the Statutes, or under any other provision of law.

9. Further answering said complaint defendant alleges that the said application, dated May 13, 1925, states the facts [fol. 42] required to be stated under sec. 31.05 of the Stats. for a permit to construct a dam but does not comply with the further requirement of the Statutes that each applicant for a permit under sec. 31.05 of the Stats. shall file with his application for a permit the proposals under subsec. (1), (2), and (3) of sec. 31.09 of the Stats., in that the proposal required under subsec. (3) of sec. 31.09 is omitted. That the said application does not state facts sufficient to give jurisdiction to the Railroad Commission to issue a permit under said sec. 31.05 of the Stats., or under any other provision of law.

10. Further answering said complaint defendant alleges that the said application, dated May 21, 1925, states the facts required to be stated under sec. 31.07 of the Stats. for a permit to operate and maintain an existing dam constructed in or across a navigable stream without legislative authority but does not comply with the further requirement of the Statutes that each applicant for a permit under sec. 31.07 of the Stats. shall file with his application the proposals under subsec. (1), (2), and (3) of sec. 31.09 in that the proposal required under subsec. (3) of said sec. 31.09 is omitted. That the said application does not state facts sufficient to give jurisdiction to the Railroad Commission to issue a permit under said sec. 31.07 of the Stats., or under any other provision of law.

11. Further answering said complaint, defendant denies that the action of the Railroad Commission complained of by the plaintiff is unlawful, unjust, or unreasonable, and alleges that the said action of the Railroad Commission was in all respects lawful, just, and reasonable.

[fols. 43 & 44] 12. Further answering said complaint defendant denies every allegation, matter and fact therein contained not hereinbefore specifically admitted, qualified or denied.

Wherefore defendant demands judgment that the plaintiff's complaint be dismissed with costs.

Herman L. Ekern, Attorney General; C. A. Erikson, Deputy Attorney General; Suel O. Arnold, Assistant Attorney General, Attorneys for Defendant, Railroad Commission of Wisconsin.

[fols. 45-51] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

DEMURRER TO ANSWER—Filed in Circuit Court November 10, 1925; in Supreme Court January 16, 1926

Now come the plaintiffs herein and demur to the answer of the defendant herein on the ground that upon the face thereof the said answer does not state facts sufficient to constitute a defense herein.

October 13, 1925.

Bouck, Hilton, Kluwin & Dempsey, Plaintiffs' Attorneys. Moses Hooper, of Counsel.

[fols. 52-56] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER TO ANSWER—Filed in Circuit Court December 31, 1925; in Supreme Court January 16, 1926

The issue of law raised herein upon the demurrer of the plaintiff to the defendant's answer coming on to be heard at said term on the 13th day of November, 1925, and after hearing Edward J. Dempsey and Moses Hooper, plaintiffs'

attorneys, in support of said demurrer, and C. A. Erikson, Deputy Attorney General, and Suel O. Arnold, Assistant Attorney General, in opposition thereto, and being advised in the premises;

It is ordered that said demurrer be, and the same is hereby overruled.

Dated December 31st, 1925.

By the court.

E. Ray Stevens, Judge.

[File endorsement omitted.]

[fols. 57-65] In Circuit Court of Dane County

[Title omitted]

Judgment—Filed in Circuit Court January 2, 1926; in Supreme Court January 16, 1926

The order of the court overruling the demurrer to the defendant's answer herein and ordering judgment in favor of the defendant in this case, upon the said demurrer having been served on the defendant's attorneys on the 2nd day of January, 1926, and the plaintiffs having elected not to proceed to trial in said action.

It is ordered and adjudged that the complaint herein be, and the same is hereby dismissed without costs to either party.

Dated at Madison, Wisconsin, this 2nd day of January, 1926.

By the Court:

E. Ray Stevens, Judge.

[File endorsement omitted.]

[fols. 66-76] Application of Fox River Co. et al. omitted; printed side page 27 ante.

[fol. 77] BEFORE THE RAILROAD COMMISSION OF WISCONSIN

W. P.-228

In the Matter of the Application of THE FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE COMPANY, THE VALLEY IRON WORKS, and THE APPLETON MANUFACTURING AND LUMBER COMPANY for Permission to Rebuild, Operate, and Maintain the So-called Middle Dam.

ORDER DISMISSING APPLICATION

On the 13th day of May, 1925, the petitioners above named, by their attorney, Moses Hooper, filed with the Railroad Commission of Wisconsin an application under Chapter 31 of the Statutes of Wisconsin for permission to rebuild and maintain the so-called Middle Dam at Appleton in and across the Fox River, extending from the head of Grand Chute Island in Section 35 south of the river, Town. 21 North of Range 17 East, of the Fourth Principal Meridian, to Lot 2 in Section 26, said Town and Range, north of the river.

The Commission examined the application and the two blue prints accompanying same, one being a map of the premises in which the dam is located, the other being entitled "Plans and Sections in two sheets. Sheet No. 2. Rebuilding of Middle Dam, in the City of Appleton, Wisconsin."

From an examination of the application and from other investigations hereinafter pointed out, the Commission finds:

That the application states the facts required to be stated under Section 31.13, except those required by subsection (b) thereof, namely, "If constructed by legislative permission, a statement of the act of the legislative authorizing the same." In fact, the application under Subdivision (e) affirmatively shows that the dam was built [fol. 78] without any legislative authority. It moreover appears from the records in the office of the Commission, as well as from an examination of the acts of the State Legislature of Wisconsin since the organization of the state that the dam in question was built without legislative per-

mission, was never legalized under Section 31.97 or under any other provisions of law, but that on the contrary it has existed since its construction and still exists as an illegal structure.

That the application does not state facts sufficient to give jurisdiction to the Commission to issue a permit to the applicant under Section 31.13 of the Statutes.

The Commission further finds that the application also states the facts required to be stated under Section 31.05 of the statutes for a permit to construct a dam, but does not comply with the further requirement of the statutes that each applicant for a permit under Section 31.05 of the statutes shall file with his application for a permit the proposals under Subdivisions (1), (2) and (3) of Section 31.09, in that the proposal required under Subsection (3) of Section 31.09 is omitted.

That the application does not comply with the requirements of the statutes so as to give jurisdiction to the Commission to issue a permit to construct a dam under Section 31.05 for the reason that the applicants have not fully complied with Subsection (3) of Section 31.09 of the Statutes.

The Commission further finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice.

Dated at Madison, Wisconsin, this 15th day of May, 1925.

Railroad Commission of Wisconsin. Adolph Kanneberg, Lewis E. Gettle.

AK-gh.

[fol. 79] RAILROAD COMMISSION OF WISCONSIN

W. P.-228

In the Matter of the Application of THE FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LTD., THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE COMPANY, THE VALLEY IRON WORKS, AND THE APPLETON MANUFACTURING AND LUMBER CO. for Permission to Rebuild, operate, and Maintain the So-called Middle Dam.

ADMISSION OF SERVICE

Due service of a certified copy of decision and order in the above-entitled matter is admitted this 18th day of May, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys.
Moses Hooper, of Counsel.

(Please sign and return by next mail.)

[fol. 80] BEFORE THE RAILROAD COMMISSION OF WISCONSIN

[Title omitted]

RENEWAL OF APPLICATION—Filed May 21, 1925

To the Honorable the Railroad Commission of Wisconsin:

Now come the applicants, by their attorneys and counsel, and renew the application filed with you on May 13, 1925, with the understanding that it is for a permit to operate and maintain an existing dam under Section 31.07 of the Statutes of Wisconsin.

May 20, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Applicants. Moses Hooper, of Counsel.

[File endorsement omitted.]

[fol. 81] BEFORE THE RAILROAD COMMISSION OF WISCONSIN

[Title omitted]

ORDER DISMISSING APPLICATION

On the 21st day of May, 1925, the petitioners above named appeared by their attorneys and counsel, represented by Mr. Dempsey, before the Railroad Commission of Wisconsin and filed a renewal of their application under their former petition filed with the Commission on May 13, 1925,

which renewal of their application is in words and figures as follows:

To the Honorable the Railroad Commission of Wisconsin:

Now come the applicants, by their attorneys and counsel, and renew the application filed with you on May 13, 1925, with the understanding that it is for a permit to operate and maintain an existing dam under Section 31.07 of the Statutes of Wisconsin.

May 20, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Applicants. Moses S. Hooper, of Counsel.

The Commission thereupon re-examined the application and finds and determines that the application states the facts required to be stated under section 31.07, Statutes, for an application for a permit to operate and maintain an existing dam which was constructed in or across a navigable stream without legislative authority, but that the application does not comply with the further requirements of [fol. 82] the statute that each applicant for such permit shall file with his application the proposals under subdivisions (1), (2) and (3) of section 31.09, in that the proposal required under subsection (3) of said section 31.09 is omitted therefrom.

Hence the Commission finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice.

Dated at Madison, Wisconsin, this 25th day of May, 1925.

Railroad Commission of Wisconsin. Adolph Kanneberg, A. R. McDonald.

AK-b.

[fols. 83 & 84] Received Railroad Commission May 27, 1925.

Referred to Secretary's Office

RAILROAD COMMISSION OF WISCONSIN

W. P.-228

In the Matter of the Application of THE FOX RIVER PAPER CO., THE PATTON PAPER CO., LTD., THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE CO., THE VALLEY IRON WORKS, and THE APPLETON MFG. AND LUMBER CO. for Permission to Rebuild, Operate, and Maintain the So-called Middle Dam

ADMISSION OF SERVICE

Due service of two certified copies of decision in the above-entitled matter is admitted this 26 day of May, 1925.

Bouch, Hilton, Kluwin & Dempsey, Attorneys for Applicant. Moses Hooper, of Counsel.

(Please sign and return by next mail.)

[fols. 85-89] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

And because the foregoing return of the Railroad Commission of Wisconsin to the circuit court for Dane County in the above entitled action does not appear of record, I, the undersigned, the circuit judge who tried said action, have, on stipulation of the respective parties, settled and signed this Bill of Exceptions to the end that the same be made a part of the record herein, this 14th day of January, 1926.

E. Ray Stevens.

[fols. 90 & 91] IN SUPREME COURT OF WISCONSIN

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Machine Company, and The Appleton Manufacturing and Lumber Company, Appellants,

vs.

RAILROAD COMMISSION OF WISCONSIN, Respondent

Dane Circuit Court

JUDGMENT—April 6, 1926

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the Circuit Court of Dane County, in this case, be and the same is hereby affirmed.

Chief Justice Vinje and Justices Rosenberry and Eschweiler dissent.

Justice Stevens took no part.

[fol. 92] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

Appeal from a Judgment of the Circuit Court for Dane County

E. Ray Stevens, Circuit Judge

Affirmed

OPINION—Filed April 6, 1926

OWEN, J.:

This action was brought in the circuit court for Dane county to review an order of the Railroad Commission. On May 13, 1925, the plaintiff presented to the Railroad Com-

mission an application for a permit to operate and maintain an existing dam constructed without legislative authority across the Fox River in the city of Appleton. The application stated the facts required to be stated under sec. 31.07 Stats., but did not contain the proposal required to be stated by subsection 3 of sec. 31.09 Stats. This provision requires the consent on the part of the applicant "that the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property o fthe grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition o fall dams, works, buildings, or other structures or equipment, used and useful [fol. 93] under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation." Because the application for the permit did not contain this proposal or consent the Railroad Commission dismissed the application.

The complaint in this action prayed judgment "directing the said Railroad Commission to take jurisdiction of said application and fix a time and place for a public hearing thereon and proceed thereon to file a determination as provided by the statutes of Wisconsin.

The plaintiff claims that the provision of the statutes requiring the applicant to consent to the valuation prescribed by the statutes in the event that the property is taken over by the state or municipality at any time after the expiration of thirty years after the permit becomes effective, is unconstitutional, and that the Railroad Commission had no right to require such a consent as a condition precedent to its entertaining and considering the application. The lower court held the law constitutional and rendered judgment

in favor of defendant, from which judgment the plaintiff brings this appeal.

[fols. 94 & 95] OWEN, J.:

Mr. Justice Stevens presided at the trial of this case in the circuit court. He therefore did not participate in the consideration and decision of the case in this court. The members of the court participating are equally divided in opinion upon the question involved on this appeal. Mr. Chief Justice Vinje, Mr. Justice Rosenberry and Mr. Justice Eschweiler are of the opinion that the judgment appealed from should be reversed. Mr. Justice Doerfler, Mr. Justice Crownhart and the writer are of the opinion that the judgment should be affirmed. Under the established rule it follows that the judgment appealed from is affirmed. Racine Auto Tire Company v. Hansen, 173 Wis. 118.

By the Court: Judgment affirmed.

[fol. 96] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed July 17, 1926

To the clerk of said court:

Please take notice that the following is a statement of the points on which the plaintiffs in error intend to rely and a stipulation relating to the portions of the record to be printed.

Points to be Relied Upon

The points on which plaintiffs in error rely are that subdivision (3) of Section 31.09 of the Statutes of Wisconsin of 1925 is not in harmony with the Federal Constitution in this

First. That it violates that provision of Article V. of Amendments to the Federal Constitution which is in words following, to-wit: "Nor shall private property be taken for public use without just compensation."

Second. That it violates that provision of Article V. of the Amendments to the Federal Constitution which is in words following, to-wit: "No person shall be . . . deprived of life, liberty or property, without due process of law."

Third. That it violates that provision of Article XIV. of the Amendments to the Federal Constitution which is in words following, to-wit: "Nor shall any state deprive any [fol. 97] person of life, liberty or property without due process of law."

Stipulation as to Parts of Record to be Printed

It is hereby stipulated by and between the plaintiffs in error and the defendant in error by their respective attorneys that the following portions of the record, which counsel believe sufficient to show the errors complained of and to present to the court the questions arising in this proceeding, shall be printed

	Page of record
Writ of Error	1
Petition Therefor	4
Order Allowing Writ	7
Assignments of Error and Prayer	12
Complaint	24
Answer	40
Demurrer	45
Order overruling demurrer to defendant's answer	52
Judgment	57
Transcript of proceedings before Railroad Commission	64
Application of Fox River Paper Company et al	66
Order dismissing the Application	77
Renewal of Application	80
Order dismissing Application	81
Bill of Exceptions settled and signed by Circuit Judge	85
Judgment of Wisconsin Supreme Court	90
Opinion of Wisconsin Supreme Court	91

It is further stipulated and agreed that if any necessary part of the record be not thus printed, the plaintiffs in error [fols. 98 & 99] have the right to print and may be required

by the defendant in error to print any further or additional portions thereof.

Dated this 15th day of July, A. D. 1926.

John F. Kluwin, Attorney for Plaintiffs in Error. Moses Hooper, of Counsel. Herman L. Ekern, Attorney General; Suel O. Arnold, Asst. Atty. Gen., Attorneys for Defendant in Error.

[fol. 100] [File endorsement omitted.]

Endorsed on cover: File No. 32,059. Wisconsin Supreme Court. Term No. 492. Fox River Paper Company, Patten Paper Company, Limited, Appleton Woolen Mills, et al., plaintiffs in error, vs. Railroad Commission of Wisconsin. Filed July 6th, 1926. File No. 32,059.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 1926

No. 492

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Machine Company, and The Appleton Manufacturing and Lumber Company, Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendant in Error

STIPULATION AND ADDITION TO RECORD—Filed March 11, 1927

To the Clerk of said Court:

Please take notice that the plaintiffs in error and the defendant in error, by their respective attorneys, have entered into the following stipulation providing for printing of an additional portion of the record herein:

It is hereby stipulated by and between the plaintiffs in error and the defendant in error, by their respective attorneys, that in addition to the parts of the record to be printed as designated by stipulation between the respective attorneys of the parties hereto, made and entered into on or about the 15th day of July, A. D. 1926, and duly filed with the clerk of said Court, that there be forthwith printed by said clerk a supplement to the Transcript of Record in this case consisting of "Directions for Order Overruling Demurrer to Answer", found on page 47 of the record; all costs and charges incident to said printing to be borne by the plaintiffs in error.

Dated March 8, 1927.

John F. Kleem, Edward J. Dempsey, Attorneys for Plaintiffs in Error. Moses Hooper, of Counsel. John W. Reynolds, John W. Reynolds, Atty. Gen., Sml. O. Arnold, Asst. Atty. Gen., Attorneys for Defendant in Error.

In Circuit Court of Dane County

Fox River Paper Company, The Patten Paper Company, Limited, The Appleton Machine Company, and The Appleton Manufacturing and Lumber Company, Plaintiffs,

vs.

Railroad Commission of Wisconsin, Defendant

Directions for Order Overruling Demurrer to Answer—Filed in Circuit Court December 12, 1925; in Supreme Court January 16, 1926

By the Court:

The case presents a single issue of constitutionality of subdivision (3) of section 31.08 of the statutes,—the so-called recapture clause of the present water power act.

The consideration of this question can be approached in the light of fundamental rules of law that are so well established that they are not questioned by any party to this action. On the one hand it is conceded that the right of the riparian owner to use the water of the river on his own land for the purpose of creating power is a private right appurtenant to the riparian land, that such right is private property which cannot be taken from the owner without the payment of just compensation based upon the value of the waterpower at the time such property is taken.

On the other hand it is conceded that all right on the part of the reparian owner to use the water of a navigable stream for the purpose of developing power must be exercised in subordination to the paramount rights of the public in and to the water of such navigable stream and that no riparian owner may construct a dam in any navigable stream until the state has given its permission.

In consenting or in refusing to consent to the erection of such a dam the state is exercising one of its sovereign functions that of protecting the interests of the public in the navigable waters of the state. Riparian owners take title to their lands with notice of the fact that all navigable waters and the title to all land under navigable waters of Wisconsin are held in trust by the state for the benefit of

all the people as a whole. "The state has the power, as such trustee for the public, to so regulate these public uses of navigable waters as to best accomplish and promote the public interests." Merwin v. Houghton, 146 Wis. 398, 409. The right of riparian owners to use the waters of navigable streams are in strict subordination to these rights of the public. Their right to build dams and to develop water powers on their lands are inchoate until the state has given its consent that a dam may be built in a navigable stream by the riparian owner for the purpose of developing water power. It is the combination of riparian ownership and of this grant by the state that creates the water power.

In granting or refusing to grant the right to build a dam in a navigable stream the state or the legislature, that acts for the people of the state, is exercising the sovereign power of determining whether a navigable stream may be obstructed or changed and, if so, whether such obstruction improves or interferes with navigation. It may grant or refuse to grant the right to construct the dam and no other department of government may control the exercise of that power vested in the legislature. If the legislature refuses to grant the requested franchise for a dam the riparian owner has been denied no constitutional right. The riparian owner must submit. He has no redress, because his rights are subordinate to those of the public. The right to build any structure in the navigable waters of Wisconsin "is subordinate to the public use, and may be regulated or prohibited by law." Cohn v. Wausau Boom Co., 47 Wis. 314, 322.

If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may grant such permission upon such terms as it shall determine will best protect the interests of the public. The legislature could impose the condition that the dam should be removed when it obstructed navigation or that it should be removed at the end of a definite period of time, for example, thirty years. The present law does not impose any such hardship upon the riparian owner. It permits him to construct and enjoy his dam for at least thirty years and then instead of compelling him to stand the loss and to bear the expense incident to the removal

of the dam, it secures repayment to him of a sum which is a reasonable equivalent to his total investment in the dam, in case he is not permitted to continue the use of the water power created by the erection of the dam.

The same fundamental rules of law apply to this case where the Commission has refused to grant the required permit, that apply when the legislature acts directly, instead of through the medium of the Railroad Commission. In either case the permit granted is a franchise in that it grants to a citizen the power to exercise a sovereign right which does not belong to citizens generally, of common right,—that of improving the navigation of a stream which is forever dedicated to the use of the public as a whole. Our court has held that a permit to construct a dam granted by legislative enactment was a franchise. State ex rel. Attorney General v. Norcross, 132 Wis. 534, 548. The nature of the permit is not changed by the fact that in granting the franchise the state has made use of the instrumentality of the Railroad Commission or of some local municipal governmental unit, like a city council. In either case the permit is a franchise in which the state may impose such conditions as it shall deem reasonably necessary to protect the interests of the public. The imposition of such terms do not constitute a taking of the property of the riparian owner by the exercise of eminent domain.

The law here in question does not apply to any existing structure which has been lawfully placed in the navigable waters of Wisconsin. Like the Workman's Compensation Act, this is an elective act, in the sense that it does not apply to any water power as to which the riparian owner does not elect to come under the act by making application for the permit or franchise provided for by the act. This fact distinguishes the law here under consideration from that held unconstitutional in the Water Power Cases, 148 Wis. 124. The act there under consideration applied to existing plans built after the granting of the proper franchise, and attempted to take such private property without just compensation.

When a riparian owner takes title to his property with knowledge that all incorporeal riparian rights and all rights of the riparian owner in and to the bed of the stream are

subject to and subordinate to the power of the state to impose such conditions as it deems necessary to protect the interests of the public in the navigable waters within its borders, the property of the riparian owner is not taken without just compensation or without due process of law merely because he elects not to accept the conditions which the state imposes when it grants the franchise, without which the riparian owner has no right to obstruct the flow of any navigable stream by the erection of a dam. The state in no way interferes with the use which the riparian owner seeks to make of his land and his riparian rights until the riparian owner seeks to interfere with the rights of the public in the navigable waters of the state. When the owner asks this franchise he must comply with the conditions which the sovereign power imposes. In so doing the state is not taking the property of the riparian owner by preventing his lawful use of the same, because no such use is lawful until the state grants a franchise for the building of a dam to develop such water power, "even though the same may prove * * * to be a benefit instead of an injury to the navigation" of the stream. Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61, 67.

The attorney general may prepare the proper order overruling the demurrer to the answer, submitting the same to opposing counsel before it is presented for signature.

Dated December 12, 1925.

Grace D. Meyers, Official Reporter.

FILE COPY

FILED

MOTION TO ADVANCE

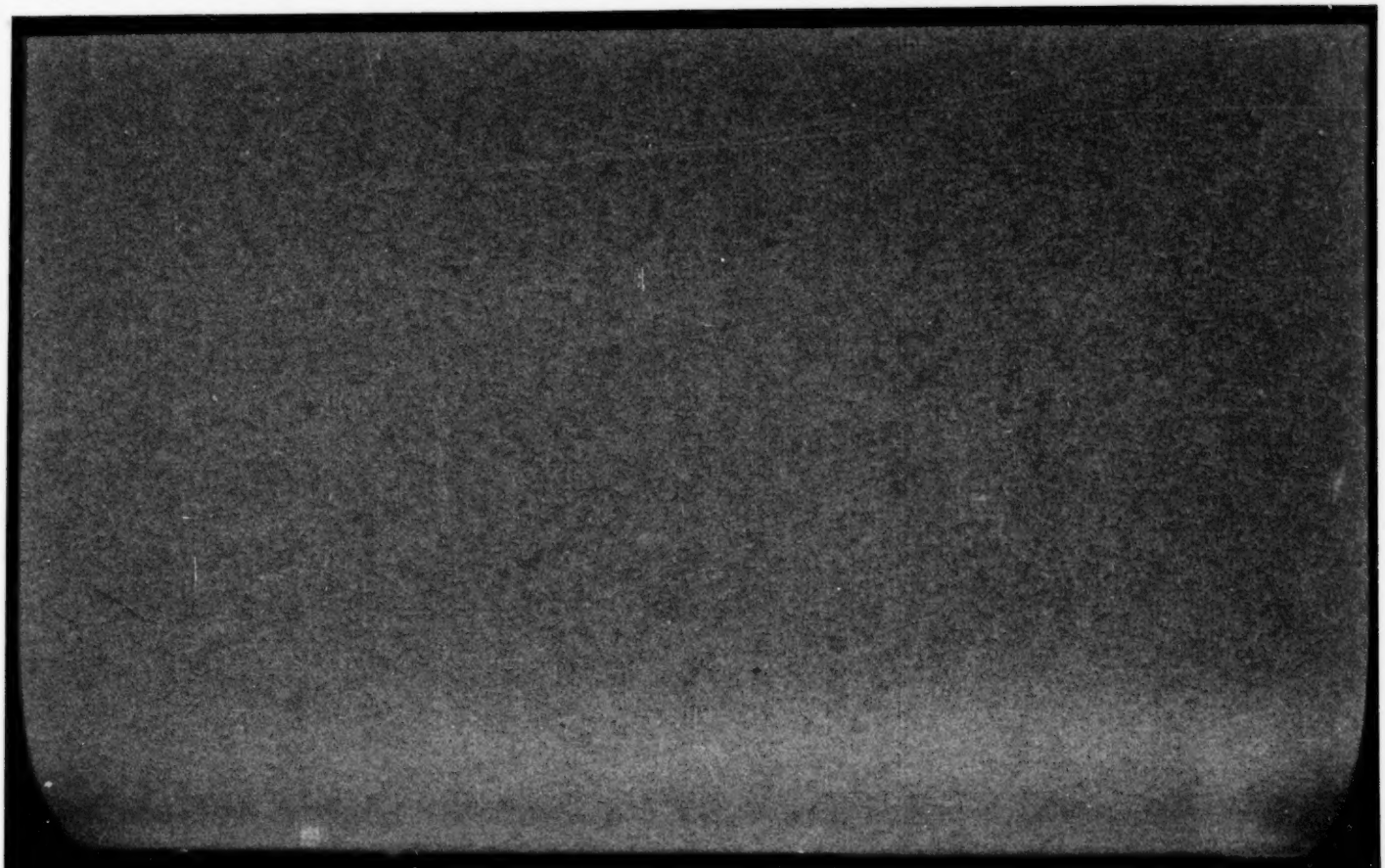
SUPREME COURT OF THE UNITED STATES

October Term, 1926

No. 492

FOX RIVER PAPER COMPANY, PATTEN PAPER COMPANY, LIMITED, APPLETON WOOLEN MILLS, ET AL.,
PLAINTIFFS IN ERROR
vs.
RAILROAD COMMISSION OF WISCONSIN,
DEFENDANT IN ERROR

SUPREME COURT OF THE UNITED STATES



MOTION TO ADVANCE

SUPREME COURT OF THE UNITED STATES

October Term, 1926

No. 492

FOX RIVER PAPER COMPANY, PATTEN PAPER COMPANY, LIMITED, APPLETON WOOLEN MILLS, ET AL.,
PLAINTIFFS IN ERROR

vs.

RAILROAD COMMISSION OF WISCONSIN,
DEFENDANT IN ERROR

SUPREME COURT OF THE UNITED STATES

October Term, 1926.

No. 492

FOX RIVER PAPER COMPANY, PATTEN PAPER COMPANY, LIMITED, APPLETON WOOLEN MILLS, ET AL.,
PLAINTIFFS IN ERROR

vs.

RAILROAD COMMISSION OF WISCONSIN,
DEFENDANT IN ERROR

In error to the Supreme Court of the State of Wisconsin.

Now come the above named plaintiffs in error and the above named defendant in error and move that the above entitled cause be taken up out of its order on the docket and advanced for hearing on the calendar of this Court, and in support of said motion make part hereof, and respectfully submit the statement of the matter involved with the reasons for the application assigned by the plaintiffs in error on the one hand and by the defendant in error on the other, which are hereunto annexed.

Dated December 24, 1926.

John F. Kluwin,
Edward J. Dempsey,
Attorneys for Plaintiffs in Error.

Moses Hooper,
Counsel for Plaintiffs in Error.

Herman L. Ekern, Attorney General,
C. A. Erikson, Deputy Attorney General,
Suel O. Arnold, Assistant Attorney General,
Attorneys for Defendant in Error.

STATEMENT OF MATTER INVOLVED

This cause is pending on a writ of error to the Supreme Court of the State of Wisconsin. On January 2, 1926, the defendant in error recovered a judgment in the Circuit Court for Dane County, in the State of Wisconsin, against the plaintiffs in error dismissing the complaint of the plaintiffs herein without costs in an action brought to compel the Railroad Commission of the State of Wisconsin to take jurisdiction of an application made by the plaintiffs in error for a permit

to rebuild a dam across the Fox River at the city of Appleton, Wisconsin. Appeal was taken to the Supreme Court of the State of Wisconsin, and that Court, being evenly divided, the judgment of the Circuit Court for Dane County was, under the rules of the Supreme Court, affirmed.

REASONS FOR APPLICATION ASSIGNED BY PLAINTIFFS IN ERROR

The plaintiffs in error own a water power on the Fox River at Appleton, Wisconsin, maintained by a wooden dam built in 1877-8 (R. 10) (c)). Parties building the dam supposed they had permission of the state to build the same (R. 11-12 (e)), but the present owners think they were mistaken.

The dam is across the lower Fox River, a river navigable in law, but not in fact, at or near the dam site (Map in Record, P. 14-15). The War Department and the dam owners wish that the dam be rebuilt on account of insecurity of the same arising from decay. (R. 13 (1)).

Plans have been submitted to, and approved by, the War Department conditioned that the owners secure permission of the State for rebuilding the same.

The state statute respecting permission to rebuild is as follows:

"31.07. APPLICATIONS FOR PERMITS TO OPERATE AND MAINTAIN EXISTING DAMS. Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the tenth day of July, 1915, shall file with the commission a written application therefor

setting forth: (1 . . . .), (2 . . . .), (3 . . . .), (4 . . . .), (5 . . . .), (6 . . . .).

"31.08. HEARING. Upon receipt of an application under section 31.07 procedure shall be had substantially as required by section 31.06, and if the commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant.

"31.09. PROPOSALS TO ACCOMPANY APPLICATIONS. . . . . and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals: (1 . . . .), (2 . . . .), (3) That the permit, if granted shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided

in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation."

The plaintiffs in error challenge the clause (3) of Section 31.09 as not in harmony with the Federal Constitution, Articles V and XIV.

The plaintiffs in error have made application to the Railroad Commission for a certificate pursuant to section 31.08 omitting the proposal (3). The Commission has held that such petition entitles plaintiffs in error to action under the Wisconsin Water Power Law, except that it does not contain the agreement required by said subsection (3), and for that reason has refused to act upon the petition and has dismissed the same (Rec. 7-8 21-22).

The Circuit Court of Dane County in an action in the nature of an appeal from such determination of the Railroad Commission, sustained such determination. (R. 26-27-28). On appeal from this determination of the Circuit Court of Dane County, the Supreme Court (The Court of last resort) of the State of Wisconsin has, by an evenly divided court, permitted the determination of said Circuit Court to stand (R. 28).

Thereby it has come about that either these plaintiffs in error must agree to surrender valuable constitutional rights to property, or the rebuilding of said dam must await the determination of plaintiff's in error contention herein.

Besides, the development of very many valuable water powers in the State of Wisconsin is being delayed and deterred by the enforcement of said subsection (3) by the Railroad Commission of Wisconsin,

and the interest of water power owners, various municipalities in the State of Wisconsin, and also the interests of the State of Wisconsin require that the issues raised on this appeal be determined as speedily as may be possible.

Finally, government improvements which have been constructed by the United States in the Fox River below the dam in question in aid of navigation, are placed in jeopardy by reason of the unsafe condition of the dam which plaintiffs in error desire to rebuild.

John F. Kluwin,
Edward J. Dempsey,
Attorneys for Plaintiffs in Error.

Moses Hooper,
Counsel for Plaintiffs in Error.

REASONS FOR APPLICATION ASSIGNED BY DEFENDANT IN ERROR

First. Defendant in error while denying that the enforcement of Sec. 31.09 (3), Wisconsin Statutes, will deprive plaintiff in error or any other water power owners in the State of Wisconsin of any constitutional rights, agrees with plaintiff in error that the speedy determination of this case is of great importance to the State of Wisconsin, and the owners of water powers in such state.

Second. Defendant states that the Railroad Commission of Wisconsin is hampered in the enforcement of Sec. 31.09 (3), Wisconsin Statutes, while any doubt exists as to its constitutionality.

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BRIEF FOR PLAINTIFFS IN ERROR

Supreme Court of the United States

October Term, 1926

No. 492

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON MACHINE COMPANY, AND THE APPLETON MANUFACTURING AND LUMBER COMPANY,

Complainants-Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,

Defendant-Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

(32,059)

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Complainants-Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,

Defendant-Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFFS IN ERROR

This case is pending on a writ of error to the supreme court of the State of Wisconsin to review a determination of that court that a judgment of the circuit court of Dane county shall stand as a final judgment. (R. 1-2). The case is reported in 189, Wis. 626. No opinion on the merits was written by any justice of the supreme court. The judgment of the circuit court was affirmed on account that the participating justices of the Supreme Court were evenly divided, three against three. (R. 27). The opinion of the Circuit Judge, Judge Stevens, is to be found in the supplemental record.

The date of the judgment to be reviewed is April 26, 1926. (R. 26).

The claim of the plaintiffs in error was that Subsection (3) of Section 31.09 of Wisconsin Statutes of 1925 is not in harmony with the provisions of the federal constitution in Articles V and XIV (R. 9, 27-8). The determination of the circuit court of Dane county, affirmed by the Wisconsin supreme court, was to the effect that such statutory provision was in harmony with the federal and state constitutions. (R. 26).

The jurisdiction of this court is invoked under Section 237 of the Federal Code of Procedure under the language, "A final judgment or decree in any suit in the highest court of a State * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

QUESTION

Herein we present one question. That is: Is Subsection (3) of Section 31.09 of the Statutes of Wisconsin in harmony with the Federal Constitution? In other words,—Is it competent to the Legislature to require the owner of water power to abdicate his right to "just compensation" on a future taking for public use as a condition of his using the property until the taking?

Note

Gibbons vs. Ogden, 22 U. S. 1;
Mugler vs. Kansas, 123 U. S. 623;
Kaukauna Co. vs. Green Bay Co., 142 U. S. 254;
Penn. Coal Co. vs. Mahon, 260 U. S. 393.

This question is of great importance to the riparian water power owners of Wisconsin.

FACTS

From 1841 until now the Statutes of the Territory and State of Wisconsin have forbidden the building of any dam across any navigable river "without permission of the Legislature." (1)

The Legislature of the Territory and State from 1841 until 1911 was pestered by riparians seeking legislative permission to dam various streams. Then the Legislature enacted a general Water Power law (Chap. 652, Laws of 1911), declaring the water power of navigable rivers in Wisconsin to be property of the State and stating conditions under which it might be improved and used. This water power law was attacked by riparians and held unconstitutional by the State Supreme Court in an unanimous decision of seven justices, on account that it, this statute, proceeded upon the assumption that the State and not the riparians owned the water powers. (2)

Thereupon the Legislature enacted the present water powers act (3). For parts material to this controversy, see appendix. This law provides for administration by the Railroad Commission. It provides for a certificate of character operating as a permit in three classes of cases.

First Class. Section 31.05. "Application for permits to construct" dams generally.

Note 1.

Laws 1841 No. 9.—R. S. of 1849, Page 34,—R. S. of 1858, Chap. 41, Sec. 2.—Sanborn and Berryman Stats. of 1898, Chap. 70, Sec. 1591, P. 1166.—Statutes of 1925, Sec. 31.01 (2).

Second Class. Section 31.07. "Applications for permits to operate and maintain existing dams."

Third Class. Section 31.13. "Raising or enlarging existing dams."

This case involves a dam of the second class provided for by Section 31.07 which reads as follows: "Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the 10th day of July, 1915, shall file with the Commission a written application therefor setting forth" certain facts.

31.08. "Upon receipt of an application under Section 31.07 procedure shall be had substantially as required by Section 31.06, and if the Commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant."

Section 31.09. "In addition to the requirements of Section 31.05 or Section 31.07, as the case may be, each applicant shall file with his application for a permit the following proposals.

Note 2.

Water Power Cases 148, Wisconsin 124.

Note 3.

Laws of Wisconsin, Chap. 755, Laws of 1925, Chap. 31.

(1) "That the Commission shall value the dam site and also its rights * * *

(2) Audit all outlays * * *

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation. [*Stats. 1915 s. 1596—9m; 1917 c. 474 s. 10; 1925 c. 222*]

The plaintiffs in error are owners of an existing dam across the Fox River at Appleton (R. 10). This dam was built in 1877-8 and has been maintained ever since (R. 10). The builders supposed they had State authority to build the same (R. 11-12-E.), but we proceed upon the view that they were mistaken. (See Petition R. 10-11-C. & E). On May 21, 1925 they presented to the Railroad Commission their application for a certificate authorizing the rebuilding and maintenance of their dam under Section 37.07 of the Statutes (R. 10 to 16).

In their petition they say that (j) "The rebuilding and enlargement of said dam in accordance herewith

will not materially obstruct navigation or violate other public or private rights or endanger life, health or property." (R. 13).

On May 25, 1925, said Railroad Commission examined such application and found and determined "that the application states the facts required to be stated under Section 31.07 of the Statutes * * * but that the application does not comply with the other requirements of the Statute * * * in that the proposal required under sub-section (3) of said section 31.09 is omitted therefrom."

"Hence the Commission finds that it is without jurisdiction to entertain the application."

"It is therefore ordered, that the application be, and the same is, hereby dismissed without prejudice." (R. 7-8-9-21-22).

This writ of error is to correct the error committed by the Supreme Court of Wisconsin in permitting the erroneous decision of the Dane County Circuit Court confirming the determination of the Railroad Commission to stand.

ASSIGNMENT OF ERROR

(1) The Supreme Court of the State of Wisconsin erred in holding that sub-section 3 of section 31.09 of the Statutes of Wisconsin of 1925 is valid. The validity of said section was denied and drawn in question by plaintiffs on the ground that it was repugnant to the Constitution of the United States and in contravention thereof.

(2) That the Supreme Court of the State of Wisconsin erred in holding and deciding that said section does not violate Article V of the Constitution of the United States.

(3) That the Supreme Court of the State of Wisconsin erred in holding that said section does not deprive the plaintiffs of property, without due process of law as guaranteed by section I of Article XIV of the Constitution of the United States.

(4) The Supreme Court of Wisconsin erred in affirming the decision of the Circuit Court of Dane County, Wisconsin, in failing to reverse said decisions with directions to said court to enter judgment according to the prayer of plaintiff's complaint.

I.

ARGUMENT

FEDERAL WATER POWER ACT NOT INVOLVED

We think the Federal Water Power Act is not involved herein on account that the Federal Government has no proprietary interest in water powers on other than its own lands; and no governmental interest in navigable waters other than that growing out of the Commerce Clause of the Constitution. (4)

In Martin vs. Waddell, Chief Justice Taney says,

Note 4.

Martin vs. Waddell, 41 U. S. 367-410 (1842);

Penna. vs. Wheeling Bridge Co., 54 U. S. 518-582-3 (1851);

Penna. vs. Wheeling Bridge Co., 59 U. S. 421-430 (1855);

Shively vs. Bowlby, 152 U. S. 1-40 (1894);

Water Power Co. vs. Water Comrs., 168 U. S. 349-358 (1897);

Leovy vs. U. S., 177 U. S. 621-632-3 (1899).

> "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." (410)

In Shively vs. Bowlby, Mr. Justice Gray says:

> "Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States." (46).

In *Water Power Company vs. Water Com'rs*, Mr. Justice Peckham reaffirms the statement made by Chief Justice Taney in *Martin vs. Waddell* and says among other things,

> "The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this Court." (366)

The decisions in all the other cases cited in Note 4 are substantially equally emphatic, and to the same effect on this point.

No doubt it is competent to Congress to take charge of, and legislate concerning, the water power, parcel of the public domain.

Prior to the Confederation water powers must have been the property of the riparians or the respective colonies. Hence they still remain such unless transferred to the Federal Government by the Articles of Confederation or the Constitution. Nothing to that effect is to be found in either such Articles or the Constitution other than the Commerce Clause of the Constitution.

Wisconsin was admitted into the Union "on an equal footing with the original states in all respects whatsoever." (9 Stat. 233).

The Federal Supreme Court holds that the states admitted came in with the same rights respecting public navigable waters as the original thirteen states had. (6).

II.

OWNERSHIP OF WATER POWER

Is the riparian the owner of the water power of navigable rivers in the State of Wisconsin as against the State?

State Legislation

In an early day this or some similar question arose in Wisconsin respecting the relative rights of the State and the riparian to such rivers. This matter was settled by Chapter 72, Laws of 1853. Section 3 provides that,

> "The boundaries of lands adjoining waters, and the several and respective rights of individuals, the State, and its citizens, in respect to all such lands and waters, shall be determined in conformity to the common law, so far as applicable as evidenced by judicial determinations in other states, in which the courts in such cases have adhered to its principles."

Note 6.

Shively vs. Bowlby, 152 U. S. 127 (1893);
Water Power Co. vs. Water Comrs., 168 U. S. 349-358-9. (1897).

This statute continued in force unchanged until the Revision of 1878. It was then recast by the Revisers and appears in the Revision of 1878 as Section 1597 and in present Statutes 30.01. (4) (c), in the following language:

> "The boundaries of lands, adjoining waters, and the rights of the state and of individuals in respect to all such lands and waters, shall be determined in conformity to the common law, so far as applicable."

State Decisions

An unbroken line of State decisions maintains the same rule as this statute declares and holds the water powers to be the property of the riparian. (7).

In Water Power Cases, the question was the right of the riparian to the water power as against the State. The decision in favor of the riparian claim was by a unanimous Court of seven Justices.

Note 7.

Fox River F. & P. Co. vs. Kelly, 70 Wis. 287 (1888);

Green Bay & M. C. Co. vs. Kaukauna W. P. Co., 70 Wis. 635 (1888);

Conn vs. Little Suamico, 74 Wis. 652 (1889);

Kaukauna W. P. Co. vs. Green Bay & M. C. Co., 75 Wis. 385 (1890);

Kimberly and Clark Co. vs. Hewitt, 79 Wis. 333 (1891);

West vs. Fox River P. Co., 82 Wis. 647 (1892);

Water Power Cases, 148 Wis. 124 (1912).

This rule of property so emphatically held both by the State legislature and by the State Court, will be enforced by this Court. (8).

In Packer vs. Bird, Mr. Justice Field said,

> "Whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." (669)

In Hardin vs. Jordan, Mr. Justice Bradley said, respecting the case of Barney vs. Keokuk,

> "we held that it is for the several States themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections." (382)

If there were any doubt about the right of the riparian owner to the water power created by the fall against his land, the State, having adopted a rule, both by Statute and Judicial decision, as between itself and riparians is not at liberty to reverse it at will. If it attempts to do so this Court will continue to follow the rule notwithstanding the departure, as held in Hardin vs. Jordan.

There is abundant uniform authority outside of Wisconsin to same effect. (9).

Note 8.

Barney vs. Keokuk, 94 U. S. 324;

Packer vs. Bird, 137 U. S. 661, 669;

Hardin vs. Jordan, 140 U. S. 371, 382.

III.

THERE IS A TAKING

Preventing the rightful use is a taking. So held in reference to height or character of buildings (9). So held in reference to mining coal or stone (9a). So held in reference to overflowing land (9b). So held in reference to maintenance of billboards (9c). So held in reference to lawful employment (9d). So held in reference to railroad grades (9e). So held in reference to interference with use of highway (9f). So held in reference to occupation of river beds (9g).

In Piper vs. Ekern, Mr. Justice Doerfler says:

> "The value of business property in a business district in a city consists in the right to use the property for business purposes, and any unreasonable police regulation restricting such right, in substance amounts to the taking of private property for a public use without compensation." (593)

Note 9.

Kaukauna Co. vs. Green Bay Co., 142 U. S. 254-276;

Gardner vs. Newburgh, 2 Johns Ch. 162-165-6;

Cary vs. Daniels, 49 Mass. 466, 480;

Gould on Waters, Sec. 204;

Farnham on Waters, Vol. 2, page 1591, Sec. 471.

Note 9.

Piper vs. Ekern, 180 Wis., 586, 593;

Bonnett vs. Vallier, 136 Wis., 193, 212-3;

Welsh vs. Swasey, 214 U. S. 91, 106, 107;

Parker vs. Comm., 178 Mass., 199, 204, 205, 206;

Bostock vs. Sams, 95 Md., 400, 413.

Note 9a.

Penn. Coal Co. vs. Mahon, 260 U. S. 393 at 413-4-5-6;

Comm. vs. Clear View, 256 Pa. 328, 331;

In re Kelso, 147 Cal. 609, 612-3.

Note 9b.

Jones vs. United States, 48 Wis., 385, 403-4;

Arimond vs. G. B. & M. C. Co., 31 Wis., 316, 334-5;

Pumpelly vs. G. B. & M. C. Co., 80 U. S. 167, 177-8;

U. S. vs. Lynah, 188 U. S. 445, 486, 469, 470, 471;

Grand Rapids Booming Co. vs. Jarvis, 30 Mich. 308, 324.

In Comm. vs. Clear View Coal Company, Mr. Justice Walling says:

> "For practical purposes the right to coal consists in the right to mine it." (331)

Note 9c.

Bill Posting Co. vs. Atlantic City, 71 N. J. L. 72, 74-5;

Comm. vs. Boston Adv. Co., 188 Mass. 348, 351-2-3;

Pasaic vs. Patterson, 72 N. J. L. 285, 287;

Chicago vs. Gunning System, 214 Ill., 628, 641-2;

Crawford vs. Topeka, 51 Kan. 756, 762.

Note 9d.

State vs. Winkler, 101 Wis., 172, 178;

In re Jacobs, 98 N. Y., 194, 105;

Butcher's Union vs. Crescent City Company, 111 U. S. 746, 757, 764;

State vs. Gardner, 58 Oh. St., 599, 610.

In Pennsylvania Coal Co. vs. Mahon, Mr. Justice Holmes says:

> "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." (414)

In re Kelso Mr. Justice Angelotti says:

> "A limitation of the use *pro tanto* deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law." (612)

In Bartemeyer vs. Iowa, Mr. Justice Field says:

> "The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it." (13)

Note 9e.

Buchanan vs. R. R. Co., 60 Wis., 264, 273-4;

Railway vs. Railway, 95 Wis., 561, 568;

Shealy vs. R. R., 72 Wis. 471, 474.

Note 9f.

Krueger vs. Telephone Company, 106 Wis., 96, 109;

Buchner vs. Railroad, 56 Wis., 403, 416;

Sherman vs. Railroad, 40 Wis. 645, 650;

Grand Rapids vs. Powers, 89 Mich., 94, 113.

Note 9g.

Janesville vs. Carpenter, 77 Wis. 288, 301.

See also Water Power Cases 148, Wis. 124, 14.

So much more abundantly in relation to water power. The value of the property is in the use of it. When the owner fails to use it, it is gone forever. The prevention of such use, except upon condition of the abandonment of a constitutional right, is a taking. Unused water power is gone forever, absolutely wasted.

IV.

POLICE POWER

Impounded water is a threat to all that lies between it and tide water. The threat is more or less serious depending on the volume impounded and the strength of the impounding works. But the danger to the public growing out of the impounding thereof is not so great as the advantage of the use thereof. The custom of the civilized world is proof of this fact. The danger, however, puts upon the state the duty of supervision of the impounding works, and upon the owners of such works the duty of obedience to supervision.

The principal advantage of impounded water is the creation of power by the restrained release thereof. The restrained release of impounded water ministers to many of the needs of mankind, while the unrestrained release is a devastating force.

The police power relates only to the moral, physical or mental well being of society.

It has no relation to loss or gain of specific property as such. Its definition is given by divers text writers and judges in divers sets of words, but no set embraces loss or gain of dollars or any representative of dollars. Its basis is the maxim *salus populi suprema lex.* But the people have most deliberately determined that certain rules tend so universally to the well being of the

people that they may not be overridden by the law-making power. These rules we call the constitution. We, the people, have not delegated to the legislators the power to override it. It says:

> "Nor shall private property be taken for public use without just compensation." (Fed. Const. 5th Am'd't.)
>
> "Nor deny to any person * * * the equal protection of the laws." (14th Am'd't.)

The safety of the people may require limitations upon, and conditions of, the use of property. It is the proper function and duty of the law-making power, and of that alone, to state such limitations and conditions. But such law making power cannot, under the guise of police power, invade constitutional right in property.(11) There must be some obvious and real connection between the actual provisions of police measures and their assumed purpose. "The Legislature cannot under the guise of such regulations, arbitrarily invade personal rights or private property." (Cyc. Vol. 8 p. 864).

Note 10.

Piper vs. Ekern, 180 Wis., 586, 592;

State vs. Kreutsberg, 114 Wis. 530, 539;

Slaughter House Cases, 83 U. S. 36, 87;

Grand Rapids vs. Powers, 89 Mich. 94, 113;

Whitney vs. Township Board, 171 Mich., 234, 237;

Water Power Cases, 148 Wis. 124, 145;

Toledo vs. Jacksonville, 67 Ill., 37, 40;

Town of Lake vs. Rose Hill Cemetery, 70 Ill. 191, 195;

In re Kelso, 147 Cal. 609, 612-3.

In town of Lake vs. Rose Hill Cemetery, Justice Scott says:

> "It is essential that such regulations must have reference to the comfort, safety or welfare of society." (195)

When the validity of legislation under the police power depends upon the degree of the encroachment and the exigency of the call, wide latitude should be given to legislative discretion. (12) But there is no room for legislative discretion when the question is one of kind of encroachment and purpose of call. That is for the Court and not for the Legislature. (13).

Whether the restraint imposed by Subsection (3) is justified under the police power is not matter of doubt. The statute challenged forbids the use of the riparian's property unless he will relinquish, or agree to relinquish, his constitutional right to "just compensation." Such condition has no relation to moral, physical or mental well being, the only proper field of police control. (4) It relates only to the terms under which the state may acquire property which it may wish to own or use without giving "just compensation."

Note 11.

State vs. Redmon, 134 Wis. 89, 102-4-5-6-7;

Bonnett vs. Vallier, 136 Wis. 201-2;

Mugler vs. Kansas, 123 U. S. 623, 661;

In re Jacobs, 98 N. Y., 108-9;

Ex parte Jentzsch, 124 Cal. 468, 472;

Barkley vs. Abrahams, 214 Ill. 640-1-2;

Crawford vs. Topeka, 51 Kan. 756, 762-3;

Grand Rapids vs. Powers, 89 Mich. 94, 113.

V.

EMINENT DOMAIN

It can hardly be claimed that the valuation fixed today will be "full compensation" at any time after the expiration of thirty years. True it may be that the discovery of new sources of power will bring about that today's valuation may exceed "full compensation" thirty years hence. But it cannot be said that the chances are even; and if they were even, it would still remain that if the valuation of today should prove to be more than "just compensation" thirty years hence, the state or the municipality may proceed, thirty years hence, to condemn at the then value.

In Penn. Coal Co. vs. Mahon, Mr. Justice Holmes uses these peculiarly fitting words:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use without compensation. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." (415)

Note 12.

Bonnett vs. Vallier, 136 Wis. 193, 199, 202;

Mehlos vs. Milwaukee, 156 Wis. 591, 599;

State vs. Redmon, 134 Wis. 89, 105, 107;

Penn. Coal Co. vs. Mahon, 260 U. S 393, 412, 416;

Watertown vs. Mayo, 109 Mass. 315, 319.

The market value of water power depends largely on the market value of coal. Suppose many water power owners yield to the duress of subdivision (3) and improve their powers now. Suppose thirty years hence the price of coal is doubled and hence the value of the water power. Then the state may make a fine speculation by taking all such powers at half their value.

The same reasoning applies to increase in value from change in conditions of vicinage, local means of transportation, good or bad times, cost of transmission of power, rates of interest, settled or unsettled social conditions, or the relative value of the dollar.

The assurance that one's property shall not be taken for public use without "just compensation" is fundamental to the well being of society. (14).

In Piper vs. Ekern, Justice Doerfler says:

> "The government of this great state, * * * cannot afford, under the guise of a police regulation, to acquire rights to private property, as is attempted by the act in the instant case, unless under the constitution it is willing to make proper compensation therefor." (596)

Note 13.

State vs. Redmon, 134 Wis. 89, 107-8;

State vs. Froelich, 115 Wis., 32, 42;

Huber vs. Merkel, 17 Wis. 355, 367;

Hairston vs. Railway, 208 U. S. 598, 616;

Youngs Case, 101 Va., 853, 863;

Priewe vs. Wis. State L. & Impt. Co., 93 Wis. 534;

Wis. Water Co. vs. Winans, 85 Wis. 39, 40, 41.

In Monongahela vs. U. S., Mr. Justice Brewer says:

> "For in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." (324)

In Gardner vs. Newburgh, Chancellor Kent says:

> "I may go further, and show that this inviolability of private property, even as it respects the acts and wants of the state, *unless a just indemnity be afforded,* has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of express and fundamental articles of right in the constitution of government." (167)

In Sinnickson vs. Johnson, Mr. Justice Dayton says:

> "This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation is an incident to the exercise of that power." (145)

Note 14.

Piper vs. Ekern, 180 Wis., 586, 596;

Monongahela Nav. Co. vs. U. S., 148 U. S. 312, 324;

Boyd vs. U. S. 116 U. S. 616, 635;

Water Power Cases, 148 Wis. 124, 144;

Sinnickson vs. Johnson, 17 N. J. L. 129, 145;

Penn. R. R. vs. B. & O., 60 Md. 263, 269;

Comm. vs. P. & R. R., 58 Pa. 26, 50;

Gardner vs. Newburgh, 2 Johns. Ch. 162, 167;

Johnston vs. Rankin, 70 N. C. 550, 555;

Lewis Em. Dom. V. 2, Sec. 683.

In Johnston vs. Rankin, Mr. Justice Rodman says:

> "Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; * * * yet the principle is so grounded in natural equity, that it has never been denied to be a part of the law of North Carolina." (555)

Chancellor Kent says:

> "This principle in American Constitutional jurisprudence is founded on natural equity, and is laid down by jurists as an acknowledged principle of universal law." (V. 2, p. 409) (339)

In Boyd vs. U. S., Mr. Justice Bradley says:

> "It is the duty of the courts to be watchful of constitutional rights and against any stealthy encroachment thereon." (635).

The scheme of confiscation set up by this statute is not limited to depriving the riparian of increased value of his water power. He is denied all consequential and severance damages that may result from the taking of his water power after the expiration of the thirty-year period. To industrial concerns like the plaintiffs in the case at bar, this denial of these elements of damage may well be ruinous. We refrain from elaborating on this point. Its mere statement is sufficient to shock the conscience of anyone competent to contemplate the consequences of such a situation.

What elements of value go to make up "just compensation" is for consideration of the court and not of the legislature. (15)

VI.

RESPONDENT'S POSITION

The position of the respondent, as disclosed by its brief below, is that the State may demand a price for its consent that the citizen may improve and use his own property. In other words, that since the riparian cannot avail himself of the water power without damming the stream and cannot dam the stream without permission of the legislature, the legislature has for sale its permission to dam the stream and may legally sell or swap the permission for an interest in water power; and that the legislature may rightfully withhold the permission unless the riparian will promise to pay the price as fixed.

Note 15.

Lumsden vs. Milwaukee, 8, Wis. 485, 494-5;

Hood vs. Finch, 8 Wis. 381, 387;

Powers vs. Bears, 12 Wis. 213, 222;

Monongahela Nav. Co. vs. U. S., 148 U. S. 312, 327;

Charles River Bridge vs. Warren Bridge, 36 U. S. 420, 571;

Brown vs. Beatty, 34 Miss. 227, 242;

Isom vs. R. R. Co., 30 Miss. 300, 313, 315;

Penn. R. R. Co. vs. B. & O. R. R. Co., 60 Md. 263, 269.

The State has sovereign control of its navigable rivers through its police power for the purpose of protecting navigation and other public rights, including the protection from escape of impounded water. It has the same sovereign control of all property within its jurisdiction through its police power to prevent such use as shall endanger life, health or property. These sovereign rights are of the same class. Both rest on the fundamental maxim *salus populi suprema lex*—the corner stone of the social fabric.

It is not only the privilege of the sovereign, but its duty as well, to exercise this power. The owner of any property must submit his property to it. More than that, every citizen must submit his body to it. He must submit to quarantine. He must dress properly. This sovereign duty begets the obligation of the riparian, wishing to build a dam, to show that the proposed structure will not interfere with navigation, fishing, or put life or property in danger.

Supposedly governments are formed for the help and not the hindrance of the people. Is it not a violation of the first principles of government that the State should hinder, not help? The State cannot use this power. It is the property of the riparian. Its use would further the interests of the State by employing labor, producing manufactured material and furnishing taxable property.

The Wisconsin riparian does not need any grant of right or power. If his dam is fit in character, he has the right, the statutory prohibition to the contrary notwithstanding. (15).

Herein he asserts that fitness. The petition declares "Said dam is weak. The rebuilding and enlargement of said dam in accordance herewith will not materially obstruct navigation or violate other public or private rights or endanger life, health or property." (R. 13 J.), (Ante p. 5-6).

He only asks that his dam be examined under the police supervision and its fitness or unfitness determined and declared.

In Conn. vs. Little Suamico, involving a dam built without legislative permission, Justice Cole says of the riparian, "He may use the stream and its banks for every purpose not inconsistent with the public use." (656). He further says, "but if the owner uses the stream in the qualified manner above indicated, the public can not complain." (658).

The charge of the trial court approved by the court of review says, "The defendants' mill dam was not an unlawful structure; the defendants had a right to build and maintain it under certain restrictions." (663).

Further, Justice Cole says, "If the beneficial use of the river was not materially affected or abridged by them, neither the public nor the plaintiff had any just ground to complain of their existence." (669).

Note 15.

Janesville vs. Carpenter, 77 Wis. 288, 300, 301;

Conn. vs. Little Suamico, 74 Wis. 651, 656-7-8;

Tyler vs. Wilkinson, 4 Mason 397;

Morgan vs. King, 35 N. Y.;

Walker vs. Board of Public Works, 16 O. 540, 544.

In Janesville vs. Carpenter, Justice Orton says, "This statute makes it unlawful for the defendant who owns this ground and has the right to use it * * * to drive piles into it anywhere within the river for any purpose. It prevents the lawful use of his property. It takes it away from him without compensation or due process of law and denies the defendant the equal protection of the laws." (301).

"Further, the Legislature usurp the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumably injurious and dangerous which is not, and can not be made to be so without a violation of the constitutional rights of the defendant. * * * It reverses many decisions of this court on the questions involved in it and which have the effect of judicial determination of the defendants' rights of property." (601-2).

So with the builder in the City. He has the land and has the right to build. But the police power requires that the fitness of the building be determined in advance. Can the State or the City claim a share of the property as a condition of the giving of the certificate of fitness?

The owner of gun powder or dynamite asks the police power where he may store it. Can the City or State demand a share of the powder for pointing out a fit place for storage? If so, what share?

Judge Stevens says:

> "If the Legislature refuses to grant the requested franchise for a dam, the riparian owner has been denied no constitutional right. The riparian owner must submit."

Let us call a spade a spade and paraphrase thus: If the State chooses, it may forbid the use by the riparian of his own property and the riparian has no remedy, because the State is sovereign. Judge Stevens says, the sovereign may say to the subject though you own this property and hence the State cannot use it, the State has the power to prevent its use and therefore you shall not use it. To the contrary see note 5.

The proposition is revolutionary. If the riparians were in the majority in the community, the proposition would threaten civil war. There are millions of dollars worth of water power unimproved in the navigable rivers of Wisconsin and there are many riparians owning such power.

Suppose a legal representative of the legislature, the City of Milwaukee for instance, should refuse to examine the building plans of the land owner, or on examination, should arbitrarily refuse a permit, and such refusal should be sustained by the Courts, how long could the social fabric withstand such an assault?

In the fable, the dog could not eat the hay, but could prevent the ox's eating it. If the ox could have given the dog a bone, perhaps the dog would have left the hay to the ox. Can the State play the dog?

In U. S. A. vs. C. D. W. P. Co., (152 Fed. 25 at 41) Judge Severens says:

> "It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless, in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

Judge Stevens says:

> "The rights of riparian owners to use the waters of navigable streams are in strict subordination to these rights of the public."

What property does any citizen own which is not "in strict subordination to these rights of the public" under the police power? The police power says *salus populi suprema lex.* (16).

In Commonwealth vs. Alger, Chief Justice Shaw says:

> "We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, or injurious to the rights of the community." (84-5).

This language of Chief Justice Shaw is quoted with approval by Cooley (572-3).

Similar language is to be found in substantially all text books on the topic and in innumerable judicial opinions.

The principle is fundamental.

Note 16.

Comm. vs. Alger, 61 Mass. 53;

Cooley Const. Lim. 572;

Cyc. V. 8, page 863 866E.

Judge Stevens further says the right to build any structure in the navigable waters "is subordinate to the public use and may be regulated or prohibited by law", quoting from Cohn vs. Wausau Boom Co., 47 Wis. 322. But the right to build any structure in any of the navigable waters of the United States "is subordinate to the public use for navigation", the supervision of which rests in the Federal Government under the Commerce Clause of the Federal Constitution. But water power dams may be built therein "provided the location and plans thereof are submitted to, and approved by the Chief of Engineers and by the Secretary of War." (17).

Federal Statutes say:

> "Such structures may be built under authority of the legislature of a state .* * * provided the location and plans thereof are submitted to and approved by the Chief of Engineers and the Secretary of War before construction is commenced."

Does it follow that the United States may take a share of the value of the riparian property for its certificate of fitness of the dam? What share may the United States take for its certificate, and what the State for its certificate, and what, if anything, may the riparian retain on account of his ownership of the property?

Suppose the Federal Statute had proceeded with a further clause that the certificate should issue and the dam be constructed only upon the payment of one-third of the value of the water power? How would that sound?

Note 17.
Act. Mar. 3, 1899, Sec. 9, 30 Stat. 1151.

Suppose Section 31.09 (3) had, instead of the agreement relating to the taking of his property by the State, provided that the riparian should pay one-third of the value of the water power as determined under 31.09 (1) and (2), as a condition precedent to the issuing of the certificate of fitness for building of the dam?

VII.

FRANCHISE

Respondent's entire argument is substantially that the State sells to the riparian the permission to build a dam. This it erroneously calls a franchise. By all definitions a grant to be a franchise must carry a gem from the crown. It must give a right to do what otherwise can only be done by the sovereign. In the instant case, the right sought is to build a dam for water power for private use only, on the land of the riparian. True it rests with the sovereign under the police power to say if the proposed dam is fit. But the building of a dam for power is not a sovereign function. In fact, the sovereign, Wisconsin itself, cannot build a dam for power except for State purposes. (18). The Water Power Act itself proceeds upon the basis that the State cannot build or buy a water power dam. It provides "That the State of Wisconsin, if it shall have the constitutional power, may acquire all of the property of the grantee" etc. (31.09) (3).

The riparian alone has the right to build the water power dam. How can the State grant a franchise to do what the State itself cannot do? Can the stream rise higher than the fountain?

Note 18.

Attorney General vs. Eau Claire, 37 Wis., 400, 435, 437, 439; State vs. Eau Claire, 40 Wis. 533, 542-3.

VIII.

OBJECT OF ENACTMENT
RESULT OF ENFORCEMENT.

No enactment can be valid, the enforcement of which takes away the fundamental rights of the citizen. Judging of the validity of statutes, the court will consider the legislative intent and result of enforcement.

States can not impinge upon private right indirectly where they can not directly. They can not abridge private rights under pretense of serving public rights. (19).

In Frost vs. R. R. Comm. of Cal., Mr. Justice Sutherland says,

> "It would be a palpable incongruity to strike down an act of state legislation which by words of express divestment seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state otherwise threatens to withhold."

In Pullman Co. vs. Kansas, Chief Justice White says, "the controlling influence of the constitution may not be destroyed by doing indirectly what can not be done directly."

Note 19.

Miles vs. Iberia Drainage Dist. 239 U. S. 478;

Mugler vs. Kansas, 123 U. S. 623, 661;

Pullman Co. vs. Kansas, 216 U. S. 56, 70;

Frost, etc. vs. R. R. Comm. of Cal. — U. S. —;

Fidelity, etc., Co. vs. Tafeya — U. S. —;

Burns Natl. Bank vs. Dunstan, 265 U. S. 17.

The Supreme Court of Wisconsin has heretofore been foremost in declaring this rule. (20).

In State vs. Redmon, Justice Marshall says, "no enactment is controlling if the tribunal created by the constitution to pass upon its character cannot reasonably escape the conclusion that the paramount law condemns it." (107). "A law is not necessarily one to promote public health and comfort of people generally, or a legitimate class thereof, merely because such is its declared purpose." (107).

State vs. Redmon, 134 Wis. 89, 107;

Janesville vs. Carpenter, 77 Wis. 288, 298-9-0.

In Fidelity & Co. vs. Tafeya, Mr. Justice ——— says, "Acts generally lawful may become unlawful when done to accomplish an unlawful end. (—).

In Burns Nat'l. Bank vs. Dunstan, Mr. Justice ——— says, "The states cannot use their most characteristic powers to reach unconstitutional results." (—).

In 1911, the politicians of Wisconsin sought popularity through an attempt to take to the State the water powers of the navigable rivers theretofore declared by uniform legislation and judicial decision to be the property of the riparian.

In that year, the Legislature enacted that the burdens theretofore resting on streams navigable as theretofore understood should thereafter rest on all streams "navigable for any purpose whatsoever." (1911, Chap. — (652).

Note 20.

Priewe vs. Wis. St. L. & I. Co., 93 Wis. 543, 550;

This provision was no doubt void on account that no provision was made for "just compensation" on account of this added burden for public use (21), or on account of the declaring of water power of such streams to be the property of the State.

The same Legislature enacted a "Water Powers Act" declaring the water powers of streams navigable "for any purpose whatsoever" to be the property of the State. On contention of the riparian, this declaration was held void by an unanimous court of seven judges. (22).

The next Legislature enacted the statute herein challenged.

Evidently the legislative intent was to take the riparians water power from the riparian owner, for the use of the State, without "just compensation." There could be no other object of the enactment and no other result of enforcement.

Note 21.

Morgan vs. King, 35 N. Y.;

Walker vs. Board of Public Works, 16 O. 540, 544;

Canal Commis. vs. Kampshall, 26 Wend. 404.

Note 22.

The Water Power Case, 148 Wis. 124.

IX.

SOVEREIGN CANNOT SELL SOVEREIGNTY

In this matter the State is acting as a sovereign and dealing with its trust estate and its police power. Esau sold his birth-right for a mess of pottage; but was the sale valid as against his heirs? (23).

In Rossmiller vs. State, Justice Marshall says:

> "It has not been supposed that the State could deal with public waters, or with any other thing upon a like trust to that of such waters, as the proprietor thereof,—that any such thing could be treated in any respect as the absolute property of the State, and used for purposes of revenue." (181)

In Illinois Central Railroad vs. Illinois, Mr. Justice Field says:

> "The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.
>
> This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested." (455-6).

Note 23.

Rossmiller vs. State, 114 Wis. 169, 181;

Illinois Central R. R. vs. Illinois, 146 U. S. 387, 455 to 460.

People vs. N. Y. etc., 68 N. Y. 71, 76;

Newton vs. Commissions, 100 U. S. 548, 559.

In Newton vs. Commissioners, Mr. Justice Swayne says:

> "Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecesors. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil." (559).

* * *

Or could the State in the person of the Attorney General declare that the State, in the person of the Railroad Commission, had made an untrue certificate, but a certificate for which the State had received its price."

Suppose the Attorney General, or the Governor, should in pursuance of his duty, examine one of the dams maintained under this section and conclude that the finding of the Railroad Commission was erroneous, and that same did materially obstruct existing navigation or endanger life, health or property. What would then be the situation? Would the State have lost its sovereign power to protect the public?

X.

DECISIONS IN POINT

Frost vs. R. R. Comm. of Cal. — U. S. —, is substantially parallel to the instant case. Therein Mr. Justice Sutherland says:

> "The naked question which we have to determine therefore is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend." (—).
>
> "In reality the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." (—).
>
> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such condition as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." (—).
>
> "And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it." (—).

This decision is more forceful in its application to the instant case on account that, contrary to the supposition that the State of California had authority to

forbid the plaintiff in error the use of the streets, the State of Wisconsin has not the authority to refuse to the riparian the privilege of building his dam under the conditions stated in the application.

The Wisconsin statute is more mischievous than the California statute. The California statute forbids the citizens to use the property of the public at public expense, while the Wisconsin statute forbids the citizen to use his own property, thereby preventing his own gain and the gain of the public as well.

In the Water Power Cases, Justice Timlin says:

> "All the police power of the State is applicable to such property and the enjoyment thereof. But such incorporeal riparian rights are not, as against the riparian owner, subject or subordinate to any salable or demisable right of the State, or to any claim of the State for compensation therefor." (145).

XI.

REMAINDER OF ACT VALID

The remainder of the Water Powers Act, subtracting subsection (3), seems to us to be valid. If so it must stand though subsection (3) falls. (24).

Respect for the legislature of 1914-15 forbids the idea that it would deprive the water power owners of the State of the use of their property except upon condition that they abdicate their constitutional right to "just compensation." This is what that legislature would have done if it had refused to enact the Water Power Act unless subsection (3) were included therein.

Note 24.

State vs. Benzenberg, 101 Wis., 172, 178;
Bittenhaus vs. Johnston, 92 Wis. 588, 599;
Water Power Cases, 148 Wis. 124, 151;
Packet Co. vs. Keokuk, 95 U. S. 80, 89;
Penniman's Case, 103 U. S. 714, 716-7;
Unity vs. Burrage, 103 U. S. 447, 459;
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March 12, 1927.

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APPENDIX 14

31.01 Definitions.
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31.03 Public utilities law applicable.
31.04 Permits to develop power.
31.05 Applications for permits to construct.
31.06 Hearing.
31.07 Applications for permits to operate and maintain existing dams.
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31.10 Permit not to be valued.
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31.12 Map, profile and plans.

31.01. Definitions. **Terms used in this chapter are defined as follows:**

(1) "Commission" means the railroad commission of Wisconsin.

(2) "Navigable waters" means all waters declared navigable by chapter 30 of these statutes.

(3) "Permit" means legislative permission granted under section 31.06 to construct, operate and maintain a dam in or across navigable waters, or under section 31.08 to continue the operation and maintenance of any dam so situated which was constructed before such legislative permits were required.

(4) "Grantee" means the person, firm, corporation or municipality to whom a permit is granted, and all subsequent owners of the grant.

(5) "Corporation" means a private corporation organized under the laws of this state.

(6) Municipality" means any town, village, city or county in the state. [*Sts. 1915 s. 1596—1; 1917 c. 474 s. 2*]

31.02 Powers of the railroad commission. (1) The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

(2) The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of this chapter of the statutes.

(3) The commission or any member or any agent or employe thereof shall at all times be accorded free access to any and all parts of any dam and appurtenances constructed or maintained in navigable waters.

(4) The commission may order and require any dam heretofore or hereafter constructed to be equipped and operated, in whole or part, as follows:

(a) With slides and chutes for the passage of logs and timber products.

(b) With a lock, boat hoist, marine railway or other device of a size and construction sufficient to accommodate navigation.

(c) With good and sufficient fishway or fishways.

(d) With spillways or flood gates capable of permitting the passage through or over the same of freshets and floods during all seasons of the year.

(e) With booms, piers or other protection works ample to safeguard flood gates from trash or other floating material.

(5) The commission, whenever consistent with public rights, is authorized and empowered to make contracts for the removal of any material from the bed of any navigable lake, to fix and determine the compensation to be paid to the state of Wisconsin for material so removed, and to enter into contracts, on behalf of the state of Wisconsin, for the lease or sale of such material, with such conditions as may be necessary for the protection of the public interests and the interests of the state of Wisconsin, provided that no such contract shall be made to continue for a longer period than five years. [*Stats. 1915 s. 1596—2; 1917 c. 474 s. 3; 1923 c. 410*] Annotated †

31.03 Public utilities law applicable. In exercising its powers and performing its duties under this chapter the commission shall be guided and controlled also by the powers with which it is invested by sections 196.01 to 197.10, so far as such sections are applicable. [*Stats. 1915 s. 1596—3; 1917 c. 474 s. 4*]

31.04 Permits to develop power. Permits to construct, operate and maintain dams may be granted to persons, corporations or municipalities under the provisions of this chapter. [*Stats. 1915 s. 1596—4, 1596—5; 1917 c. 474 s. 5; 1925 c. 222*]

31.05 Applications for permits to construct. Any person, firm, corporation or municipality desiring a permit to construct, operate and maintain a dam shall file with the commission a written application therefor, setting forth:

(1) The name of the navigable waters in or across which a dam is proposed to be constructed and a specific description of the site for the proposed dam.

(2) The purpose or purposes for which the proposed dam is to be constructed, operated and maintained.

(3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose or purposes, evidence that the described dam site is owned by the applicant.

(4) A general description of the proposed dam, of the material to be used in the construction thereof, and a general description of all booms, piers, and other protection works to be constructed in connection therewith.

(5) The approximate amount of hydraulic power that the proposed dam is capable of developing.

(6) The location of the nearest city or village and of the nearest existing dam above and below the site of the proposed dam.

(7) A map on the scale of not less than four inches to the mile showing the lands that may be affected by the construction, operation or maintenance of the proposed dam, or by any flowage that may be caused thereby and approximately the outline of such flowage, which map shall indicate the ownership of each tract of land within the flowage.

(8) Such additional information of any nature that may be required by the commission. [*Stats. 1915 s. 1596—6; 1917 c. 474 s. 6; 1925 c. 222*] Annotated †

31.06 Hearing. (1) Upon receipt of an application for a permit the commission shall fix a time, not more than eight weeks thereafter, and a convenient place, for a public hearing thereon; it shall also give notice of such time and place to the applicant who shall cause the same to be published once each week for three successive weeks before such hearing in at least one newspaper, designated by the commission, in each county in which riparian lands will be affected by the proposed dam.

(2) In addition to such publication the applicant, not less than twenty days prior to such hearing, shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and postpaid envelope properly addressed. Proof of such publication and notice shall be filed, with the commission.

(3) At such hearing or any adjournment thereof the commission shall consider the application, and shall take evidence offered by the applicant and other

persons in support thereof or in opposition thereto, may require the amendment of the application, and if it shall appear that the construction, operation or maintenance of the proposed dam will not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, the commission shall so find and a permit is hereby granted to the applicant. [*Stats. 1915 s. 1596—7; 1917 c. 474 s. 7*]

31.07 Applications for permits to operate and maintain existing dams. Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the tenth day of July, 1915, shall file with the commission a written application therefor setting forth:

(1) The name of the navigable waters in or across which such dam was constructed and a specific description of the dam site.

(2) The year in which the construction of the dam was completed, and a detailed description of the dam and equipment, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the dam is constructed.

(3) The purpose for which the dam was theretofore operated and is operated at the time application hereunder is made, and the purpose for which it is proposed to operate and maintain the dam.

(4) The approximate amount of hydraulic power developed thereby.

(5) The location of the nearest city or village and of the nearest existing dam above and below the dam site.

(6) Such additional information of any nature whatsoever as may be required by the commission. [*Stats. 1915 s. 1596—8; 1917 c. 474 s. 8*] Annotated †

31.08 Hearing. Upon receipt of an application under section 31.07 procedure shall be had substantially as required by section 31.06, and if the commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant. [*Stats. 1915 s. 1596—9; 1917 c. 474 s. 9*]

31.09 Proposals to accompany applications. Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may aacquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation. [*Stats. 1915 s. 1596—9m; 1917 c. 474 s. 10; 1925 c. 222*]

31.10 Permit not to be valued. Each and every permit is granted, and shall be conclusively deemed to be accepted, subject to the condition that no element of value whatever shall ever attach to or be allowed for such permit in and of itself in the sale or acquisition of the property used and useful under such permit or otherwise. [*Stats. 1915 s. 1596—10; 1917 c. 474 s. 11*]

31.11 Certificate of terms and forfeiture of permits. The commission shall issue to every grantee of a permit a certificate evidencing a grant of the permit allowed by law. Every permit, and every franchise heretofore granted by the legislature, to construct, main-

tain and operate a dam shall become null and void, unless the dam thereby authorized be completed within five years from the time when the permit or the franchise was granted; but the commission, for good cause, may extend such time for a period not exceeding two years. [*Stats. 1915 s. 1775c; 1917 c. 474 s. 11*]

31.12 Map, profile and plans. (1) The grantee of a permit under section 31.06, to construct, maintain and operate a dam, before commencing any work of construction authorized by the permit, shall submit to the commission a complete map and profile on the scale of not less than one inch per thousand feet showing the land that may be affected by the construction and maintenance of the dam, or by any flowage that may be caused thereby, and the outline of the flowage, and such other hydrographic and topographic data as the commission may prescribe, and shall also file complete detailed plans and specifications for the proposed dam, including all booms, piers, or other protection works.

(2) The commission shall examine the map, profile, plans and specifications; shall hear the grantee thereon and may reject the same or any part thereof, if unsatisfactory or incomplete, or may suggest and require modifications thereof. If the map, profile and plans and specifications are satisfactory and complete, or, if the same shall be modified as suggested and required, the commission shall so find and approve the same, and thereupon the grantee shall have authority to construct the proposed dam in accordance therewith, but the commission may, at any time during the construction of any dam and in the interest of the public

safety, or of any public rights in navigable waters, authorize, order or require such changes in the plans and specifications and the construction of the dam as shall be necessary.

(3) If the commission, in the case of an application for a permit to construct a dam with a capacity of less than two hundred fifty hydraulic horse power at ordinary stage of water, shall find that the information and data furnished in the original or amended application is sufficient, the applicant shall not be required to furnish the additional or more detailed information or data specified in subsections (1) and (2) of this section. The commission may, however, at any time during the construction of any such dam authorize, order or require changes in the construction or the method or plan of construction thereof, as provided in subsection (2) of this section.

(4) Within ten days after the completion of any dam the grantee shall file with the commission a verified statement that the same was constructed in accordance with the plans and specifications approved by the commission; or in case no plans and specifications were required to be filed, then that the dam was constructed in accordance with the description contained in the application. [*Stats. 1915 s. 1596—11; 1917 c. 474 s. 12*]

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REPLY BRIEF FOR PLAINTIFFS IN ERROR

Supreme Court of the United States

October Term, 1926

No. 492

Office Supreme Court, U. S.
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FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON MACHINE COMPANY, AND THE APPLETON MANUFACTURING AND LUMBER COMPANY,

Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

EDWARD J. DEMPSEY,
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Of Counsel.

(32,059)

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Supreme Court of the United States

October Term, 1926

No. 492

FOX RIVER PAPER COMPANY,
PATTEN PAPER COMPANY, Limited,
APPLETON WOOLEN MILLS, et al.,
Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF OF PLAINTIFFS IN ERROR

For brevity the plaintiffs in error and the defendant in error are referred to herein as plaintiffs and defendant.

Defendant challenges the jurisdiction of this court because:

1. There is no federal question presented nor involved. (Deft's Brief, 4)

2. The decision of the lower court upon a purely State question is adequately sustained in the record. (Deft's Brief, 7)

A mere statement of certain undisputed record facts is sufficient to meet this argument on jurisdiction.

The complaint alleged:

> "These plaintiffs are deprived of the legal and proper use of their said water power in violation of Article V of the Federal Constitution which provides that:
>
> 'No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation,'
>
> and in violation of the provisions of the XIV. amendment of the Federal Constitution expressed in the following words:
>
> 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,'
>
> and in violation of the 13th Section of Article I of the State Constitution, which provides that 'the property of no person shall be taken for public use without just compensation therefor'." (T. R. 9).

Defendant's Answer denied that

> (1) "plaintiffs are deprived of the legal and proper use of their said water power in violation of Article V of the Constitution of the United States.
>
> (2) "plaintiffs are deprived of the legal and proper use of their said water power in violation of the provisions of the XIV amendment to the federal constitution." (T. R. 17)

No other defense was pleaded. All other material allegations of the complaint were admitted. Therefore plaintiffs demurred to the answer. Thus the constitutionality of Sec. 31.08 of the Wisconsin Statutes was the only issue raised by the pleadings. It

was the only question argued before the trial court. It was the only question considered by the trial court. There is no room for doubt on this point. It is impossible to even quibble about it. The first sentence of the opinion of the trial judge states the issue before the circuit court in these plain and unequivocal words,

> "The case presents a single issue of constitutionality of subdivision (3) of Section 31.08 of the Satutes,—the so-called recapture clause of the present water power act." (T. R. 32)

He then proceeded to decide this question adversely to the plaintiffs and in so doing used this introductory sentence:

> "The consideration of *this question* can be approached in the light of fundamental rules of law that are so well established that they are not questioned by any party to this action." (T. R. 32)

The constitutional question raised by the pleadings and decided adversely to plaintiffs by the trial court was the only question raised on the appeal to the supreme court of the State of Wisconsin. No other question was briefed, presented, argued or considered. The supreme court of the State of Wisconsin did not leave this court in the dark as to what it decided in this case. It held absolutely and emphatically that the statute challenged on this appeal is constitutional. This case is officially reported as follows:

> "Fox River Paper Company, Appellant, vs. Railroad Commission of Wisconsin, Respondent, 189 Wis. 626." (T. R. 26)

It is not a memorandum decision in any sense of the word.

The court says, in its statement of the case:

> "The plaintiff claims that the provisions of the statutes requiring the applicant to consent to the valuation prescribed by the statutes in the event that the property is taken over by the state or a municipality at any time after the expiration of thirty years after the permit becomes effective, is *unconstitutional* * * * . The lower court held the law *constitutional* and rendered judgment in favor of defendant, from which judgment the plaintiff brings this appeal." (T. R. 28)

Mr. Justice Owen, announcing the decision of the court, said, (627)

> "Mr. Justice Stevens presided at the trial of this case in the circuit court. He therefore did not participate in the consideration and decision of the case in this court. The members of the court participating are equally divided in opinion upon *the question* involved on this appeal. Mr. Chief Justice Vinje, Mr. Justice Rosenberry and Mr. Justice Eschweiler are of the opinion that the judgment appealed from should be reversed. Mr. Justice Doerfler, Mr. Justice Crownhart and the writer are of the opinion that the judgment should be affirmed. Under the established rule it follows that the judgment should be affirmed. Under the established rule it follows that the judgment appealed from is affirmed." (T. R. 28)

Could an adverse decision on a constitutional question be set forth more clearly or emphatically? The statement of the case made by the court indicates that the single question of the constitutionality of Section 31.08 of the Wisconsin Statutes was before it for consideration. The decision of the court indicates that the judges participating were evenly divided on "the question". No doubt can arise as to what that question was. There is no room here for speculation or conjecture as to the basis of the state court's decision. The

decision conclusively eliminates the possibility that a non-federal question was ever thought of by any member of the court. So far as these plaintiffs are concerned and so far as other riparians in the State of Wisconsin are concerned, this decision in favor of the constitutionality of this statute is final and binding for all time unless reversed by this court.

Counsel for defendant cite divers cases in support of the proposition that because there is no state supreme court opinion here, this court may examine the record in this case to ascertain whether there was an independent ground upon which the state court decision would be upheld. The following cases are so cited:

Klinger v. Missouri, 13 Wall. 257, 263;

Johnson v. Risk, 137 U. S. 300, 306, 307;

Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 69;

Allen v. Arguimbau, 198 U. S. 149, 154, 155;

Bachtel v. Wilson, 204 U. S. 36, 40;

Cuyahoga Power Co. v. Northern Realty Co., et al. 244 U. S. 300, 303. (Deft's Brief 7, 8, 9, 10).

These cases are not in point.

Before stating the rule which controls jurisdiction in this case, we will make brief reference to each of these cases.

Klinger v. Missouri, 13 Wall. 257. The issues and the law on jurisdiction in that case are clearly stated in the second paragraph of the syllabus, page 257:

> "By the constitution of Missouri, adopted in 1865, a test oath was prescribed to be taken by public officers, jurors, etc., which this court, in Cummings vs. Missouri, (4 Wallace 277), decided

to be unconstitutional. A juror, on a trial for murder in a State court, refused to take it; but on being examined as to the reason for his refusal, he alleged, not only that he had sympathized with the late rebellion, and, therefore, could not take it truthfully, but that those were his feelings still, and stronger than ever; whereupon the court discharged him. *Held*, that his avowed present disloyalty to the government was a sufficient cause in itself for his discharge, irrespective of his refusal to take the oath; and as it did not appear that he was discharged for the latter cause, the Supreme Court of the United States refused to take jurisdiction of the case."

Johnson v. Risk, 137 U. S. 300. The issues and the law on jurisdiction in that case are clearly stated in the first paragraph of the opinion, page 366:

"The defendants below demurred upon two general grounds one of which involved the construction of the provisions of the bankrupt act of March 2, 1867, and the other, the bar of the statutes of limitation of the State of Tennessee. So far as we are advised, no opinion was given by the Supreme Court of that State, upon rendering the judgment of affirmance, and the record discloses no specific statement of the ground upon which the court proceeded. Inasmuch as one of the defences called for the construction and application of a State statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the decisions of the highest court of the State, (Gormley v. Clark, 134 U. S. 338, 348) the plaintiff in error, if he wished to claim that this cause was disposed of by the decision of a federal question, should have obtained the certificate of the Supreme Court to that effect, or the assertion in the judgment that such was the fact."

The decisions of the state courts in the remaining cases under discussion were merely memoranda decisions and are reported in the State Reports as follows:

Allen v. Arguimbau, 48 Fla., 319:

> "Writ of error to Circuit Court, Monroe County; Joseph B. Wall, Judge.
>
> Appearances * * * * *.
>
> "This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. The judgment is affirmed.
>
> "Decision Per Curiam."

Bachtel v. Wilson, Sheriff, 74 Ohio State Reports, 524:

> "Error to Circuit Court of Stark county.
>
> Appearances * * * * *.
>
> "Judgment affirmed.
>
> "Shauck, C. J., Price, Crew, Summers, Spear and Davis, J. J., concur."

The Northern Realty Co. v. The Cuyahoga River Power C., 88 Ohio State Reports, 616:

> "No. 1344. The Northern Realty Co. v. The Cuyahoga River Power Co. Decided September 23, 1913. Error to Circuit Court of Summit county. Appearances * * * * *. Judgment affirmed. Johnson, Donahue, Newman and Wilkin, JJ., concur."

Comparison between the decisions in the state courts in each of these cases and the decision of the Wisconsin supreme court in the case at bar is unnecessary.

As above stated, the supreme court of Wisconsin held that the federal question involved was before it for consideration and actually decided it adversely to the federal right asserted. Therefore, it is the duty of this court to take jurisdiction under the familiar rule stated in Rogers v. Hennipen County, 240, U. S. 184, 188-189. In that case this court said:

> "It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment, assuming it to be a final judgment as it is here. Hancock National Bank v. Farnum, 176 U. S. 640, 642; San Jose Land Co. v. San Jose Ranch Co., 189 U. S. 177, 179, 180; Am. Exp. Co. v. Mullins, 212 U. S. 311, 313; Atchison, Topeka and Santa Fe Ry. v. Sowers, 213 U. S. 55, 63; Miedreich v. Lauenstein, 232 U. S. 248, 257; Carlson v. Curtiss, 234 U. S. 103, 106; Mallinckrodt Works v. St. Louis, 238 U. S. 41, 49."

To the same effect in North Carolina Railroad Company v. Zachary, 232 U. S. 248, 257, this court said:

> "In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial court in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the State either decided or assumed that the record sufficiently presented a question of Federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass

upon the merits of the Federal question. Home for Incurables v. City of New York, 187 U. S. 155, 157; Land & Water Co., v. San Jose Ranch Co. 189 U. S. 177, 179; Haire v. Rice, 204 U. S. 291, 299; Chambers v. Balt. & Ohio R. R., 207 U. S. 142, 148; Miedreich v. Lauenstein, decided this day, ante, p. 236."

Further citation of authority appears to be unnecessary, nor would it serve any useful purpose, to summarize or analyze the cases cited by the court in these cases.

Estoppel is urged. (Deft's Brief, 12, 13, 14, 15, 16).

In support of this contention, defendant cites Pera v. Shorewood, 176 Wis. 261, wherein plaintiff claimed compensation for damages under an ordinance and "came into court relying upon the ordinance as a valid basis for his claim"; State ex rel. Kellogg vs. Currens, 111 Wis. 431, wherein it was held that applicant for a license to practice medicine having depended upon the validity of the statute on which he based his claim, therefore estopped from challenging its constitutionality; Enterprise Irrigation District et al v. Farmers Mutual Canal Co., 243 U. S. 157, 163, wherein this court said, page 165,

> "It does not, as we think, admit of doubt that the estoppel *in pais* is made an independent ground of the judgment. Instead of being interwoven with the validity of the state board's adjudication, which is the other ground, it is distinct from it and is so treated in the court's opinion * * *. Also that estoppel was presented by the pleadings, was in the mind of the parties when the stipulation was made, and was dealt with by counsel and court as a matter of obvious importance;"

Hurley v. Commission of Fisheries, 257 U. S. 223, 225, wherein this court stated, page 225:

> "Appellant sought a temporary injunction restraining the Virginian Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds in the Rappahannock River, planted by him and which he claimed the right to occupy, and thereby opening the same for public use and enjoyment.
>
> "He maintained that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing and that proposed action would deprive him of property without due process of law contrary to the Fourteenth Amendment.
>
> "A majority of the three judges composing the court below concluded—264 Fed. 116—that the Commission had acted in substantial compliance with the challenged statute, that whatever rights of property appellant claimed in respect of the specific lands, or the oysters thereon, were necessarily based upon the statute itself and that he could not both assail it and rely upon it in the same proceeding."

Central Land Co. v. Laidley, 159 U. S. 103, wherein the court says, pages 109, 110:

> "The appellate jurisdiction of this court upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state

> court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the State has erred in its construction of the statute."

Sayward vs. Denny, 158 U. S. 180, wherein this court, in dismissing writ of error, said:

> "It is enough that there is nothing in the record to indicate that the State courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

Other cases are cited in support of defendant's contention on estoppel, but we make no comment upon them because they do not appear to be in point.

Further, estoppel was not pleaded. It was not presented to the trial court. It was not presented to the supreme court. It was not considered by either court. The supreme court of the state of Wisconsin decided that Section 31.08 Wisconsin Statutes does not violate the Federal Constitution. Though the defense of estoppel or some other defense could have been successfully urged by the defendant, that fact does not deprive this court of jurisdiction.

Even if we concede that the Wisconsin supreme court could have brought itself to hold that this statute is elective like the workmen's compensation laws because,

as counsel suggest, plaintiffs are free to install steam power on their lands adjacent to the Fox River, (Deft's Brief, 11) it would still be the duty of this court to take jurisdiction.

This contention is fully supported by Rogers v. Hennepin County and North Carolina R. R. Co. v. Zachary, supra, and cases therein cited; also by Grayson et al v. Harris, et al., 267 U. S. 352, decided March 2, 1925, wherein this court said, page 358:

> "Nor need we inquire into the defense of the statute of limitations. The decision now under review entirely ignores it. The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not. Rogers v. Hennepin County, 240 U. S. 184, 188-189; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 608."

Defendant's contentions with respect to jurisdiction are untenable. The record clearly indicates the fact to be that the defendant in the trial court and in the supreme court of the state of Wisconsin elected to contest the constitutionality of this statute in this proceeding. The state court of last resort proceeded on this theory. It held the statute valid against plaintiff's claim of unconstitutionality under the Federal Constitution. Therefore, the defendant must submit to the jurisdiction of this court. It is to the interest of plaintiffs, defendant, the riparians of Wisconsin and all its people that this case be decided on the merits at this time. Delay of such decision will serve no useful purpose.

REPLY ON THE MERITS

OWNERSHIP OF WATER POWER

Under this head we cite in Note 7 our brief divers cases to show the Wisconsin rule. Such cases are criticised and analyzed by defendant's counsel on pages 35 to 46 of their brief. It is true that none of these cases, except the leading one, the Water Power case, were in the name of the State. But in Conn. vs. Little Suamico, the plaintiff, Conn, relied upon the soveriegn right of the state respecting navigation as against the right of the riparian to build a mill dam. The right of the State was as completely involved and adjudicated as if the State had been plaintiff.

In Green Bay and M. Canal Co. v. Kaukauna Water Power Co. the contention was over the right of the water power company as a riparian to the water power as against the State to take the power in aid of slack water navigation. The determination of the State court was that the water power company was, as against the State, the owner of the water power, but that it had been taken by the State for public use for navigation and full opportunity had been given the water power company to have "just compensation." The holding of this court was to same effect (142 U. S. 272, 273, 276).

The language of Mr. Justice Brown quoted by the defendants in their brief, page 36, includes this: "if the State could condemn this use of the water with the other property of the riparian owner, it may raise a revenue from it sufficient to complete the work which might otherwise fail." Plainly this language relates to the condemnation by the State of the water power

under the right of eminent domain, which is certainly entirely contradictory to the idea that the water power was the property of the State to be used for public purposes. The use therein was for a public purpose.

There has been much water power litigation in Wisconsin, all of which has proceeded on the assumption that the riparian is the owner of the power, wherein there was no express statement of such rule, because no such question was raised. (Note 1)

Defendant says, "Nowhere has it been decided that the public use does not include the use of navigable waters to develop water power for public purposes." (Deft's Brief, 24).

"That the energy of falling water in a navigable stream is not a riparian right; (Deft's Brief, page 27).

"That developed power is appurtenant to the dam and not to the riparian lands." (Deft's Brief, page 27).

Note 1.

The Orton-Noonan Cases on Milwaukee River, reported in 4 Wis., 335 (1856); 27 Wis. 272, (1870); 30 Wis. 611 (1872); 31 Wis. 265 (1872); 31 Wis. 297 (1872); ;

Blanchard vs. Doering, 21 Wis. 477 (Rock) 1867;

Blanchard vs. Doering, 23 Wis. 200 (Rock) 1868;

Samuels vs. Blanchard, 25 Wis. 329 (Rock) 1870;

Clark vs. Plummer, 31 Wis. 442 (Wisconsin) 1872;

Valley P. & P. Co. vs. West, 58 Wis. 599 (Fox) 1883;

Mack vs. Bensley, 63 Wis. 80 (Wisconsin) 1885;

Pioneer W. P. Co. vs. Bensley, 70 Wis. 476 (Wisconsin) 1888;

Mack vs. Bensley, 74 Wis. 112 (Wisconsin) 1889.

On the other hand, no suggestion has heretofore ever been made so far as we know that the public use does include the use of navigable waters to develop power for public purposes, but all Wisconsin cases involving water power rights heretofore reported, proceed upon the supposition that such power is the private property of the riparian, appurtenant to the bank.

If this view of the nature of a title to water power is right, we in Wisconsin have all been wrong from the beginning. If this is right, then the foundation on which we have heretofore rested title to property is broken up. It then becomes a question of time and circumstance when the title to any property may fail. Whether it is right that there should be private ownership of natural resources is a question with which this brief does not meddle. But when timber shall become of public use and hence the State may take it; when farm land shall become of public use and hence the State may take it; then, if water power shall become of public use, the state may take it. But until we reach the time when all natural resources shall be held to be public property inalienable by the State, it would seem that water power should continue to be held to be private property of the riparian to be taken by the public only upon making "just compensation."

No suggestion has ever been made that the bank does not belong to the riparian. Riparian rights include the right to water power appurtenant to the bank and not to the bed of the stream. It is, as its name implies, a riparian or bank right. (Note 2).

OTHER STATE LEGISLATION RESPECTING WATER POWER.

By Sec. 8, Ch. 212, Laws of 1849, it was enacted that,

> "Whenever there shall be a water power upon any school or university lands which are offered for sale, it shall be optional with the commissions to sell together all the tracts or lots upon which such water power is situated, and such other tracts or lots as are necessary for the use and enjoyment of the same, not exceeding, however, one hundred and sixty acres, or they may sell each such tract and lot separately, as in their opinion will be most beneficial to the interests of the school and university fund."

Note 2.

Deitrich vs. Railroad Co., 42 Wis. 248 (1877);
Fox River Paper Co. vs. Kelly, 70 Wis. 287, 294-5, 298 (1887);
Merwin vs. Houghton, 146 Wis. 398, 405;
Lyons vs. Fishmongers, L. R. 10 C. H. 679;
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Canal Commrs. vs. Kempshall, 26 Wend. 404, 418-9 (1841);
Kent's Com. 11th Ed. V. 3, 439;
Gould on Waters, Sec. 148;
Farnham on Waters, V. 11 Sec. 463 pp. 1568-9-0;
Lewis Em. Dom. Sec. 61b p. 71, Vol. 1;
Coulson & Forbes, 62-3-4, 110-1-2;
Wiel on Waters, Sec. 906.

This legislation recognizes the fact that water power existing on lands adds to their value in the hands of the riparian. It was re-enacted in the same language as Sec. 8 of Ch. 24 of Revision of 1849, and as Sec. 24 of Ch. 28 of Revision of 1858. It was also re-enacted as Sec. 195 of Revision of 1878, appearing there in the following language:

> "Whenever there shall be a water-power upon any of said lands which are offered for sale it shall be optional with said commissioners to sell together all the tracts or lots upon which such water power is situated and such other tracts or lots as are necessary for the use and enjoyment of the same, not exceeding, however, one hundred and sixty acres, or they may sell each such tract or lot separately, as in their opinion will be most beneficial to the fund to be derived from such sale."

Sec. 1052 of Revision of 1878 provides that the assessor in determining the value of real property,

> "shall consider, as to each piece, its advantage or disadvantage of location, quality soil, quantity of standing timber, water privileges, mines," etc.

This provision was enacted as Sec. 16 of Ch. 130 of the Laws of 1868, and continued as Sec. 1, Ch. 250 of the Laws of 1877, and Sec. 1 of Ch. 334 of the Laws of 1878.

Sec. 135 of Revision of 1878 provides that,

> "the terms 'real property', 'real estate', and 'land' when used in this title shall include not only the land itself but all buildings, fixtures, improvements, rights and privileges appertaining thereto."

Under these two sections valuation of land in view of appurtenant water power (drawn from a navigable river) was sustained in Spensley vs. Valentine, 34 Wis. 154. And in Smith vs. Ford, 48 Wis. 115, at 163,

it was held that a race-way, the only use of which was to carry water for power to mill lots, could not be assessed separately from the lots.

Sec. 1, Ch. 95 of Laws of 1901, provides that,

> "every city of the fourth class * * * is hereby authorized and empowered to purchase, lease or construct steam power or water power for"

general public purposes. It can hardly be contended that this provision relates to the purchase of water power of which the State is the owner as a riparian on account that no school or university lands or other lands of which the state is the riparian owner would be found in or near cities of the fourth class.

Neither can it be claimed that the meaning of this statute was that the water power to be purchased was water power of the State, nor appurtenant to any riparian lands, on account that up to and long after the passage of this act water power was universally recognized as an appurtenant to riparian ownership, as appears by other legislation and judicial decision, and as particularly appears by necessary inference from Sec. 195 of the Revision of 1878.

In 1909, by Ch. 374 (207-m), the legislature enacted that,

> "whenever the State of Wisconsin shall hereafter convey in any manner whatsoever any of its lands, the conveyance thereof shall be subject * * * to continued ownership by the State of all water power rights on such lands or in any manner appurtenant thereto."

In 1907, the legislature proposed and agreed to a constitutional amendment to enable the State to acquire the water powers. Res. 31, 1293).

In 1909, the legislature ratified and agreed to this amendment, and submitted the same to the people. (Ch. 514).

At the November election, 1910, the people duly ratified and adopted this amendment. (Acts 1911, 1152-3).

In 1911, the legislature proposed and agreed to a constitutional amendment to enable the State to acquire the water power resources of the State. (Res. 47, 1121).

UNITED STATES VS. CHANDLER-DUNBAR CO. 229 U. S. 53.

The River St. Mary, therein involved, is an international river necessarily subject to the treaty making power.

In that part of the language of Mr. Justice Lurton quoted in defendant's brief, on page 30, appears the following:

> "Nor need we consider cases cited which deal with the rights of riparian owners under State laws."

WISCONSIN RIPARIAN DOES NOT NEED ANY GRANT OF RIGHT OR POWER.

Defendant cites the case of Wisconsin River Improvement Co. vs. Lyons, 30 Wis. 61, as authority that the state may properly refuse permission to the riparian to build a dam for water power notwithstanding the fact that such dam would not interfere with navigation or any other public right or endanger property, health or life. To the contrary are two cases later in time quoted from in plaintiff's brief at pages 23, 24 and 25, both holding distinctly to the contrary. One of them, Janesville vs. Carpenter is referred to with approval in Kaukauna Co. vs. Green Bay and M. Canal, 142 U. S. 254 at 271-2.

In the Water Power Cases, Mr. Justice Timlin says,

> "We say that if the exercise of this riparian right in the judgment of the legislature interferes with the public right of navigation, it may be forbidden." (149) "The state may refuse its permission to the riparian owner to build a dam and may attach conditions to its consent such as the heighth, strength, mode of construction, etc. of the dam, and perhaps other conditions, but it may not seize upon this right without compensation and use it or sell it or lease it to another." (150).

EFFECT OF FRANCHISE THEORY

Defendant's brief is largely, practically wholly, concerned with the proposition that the state permit to build a dam in a navigable river is a franchise; and that a franchise is a contract entered into for a valuable consideration; and that such contract is a sufficient consideration for the surrender of the defendant's constitutional right to just compensation for property taken.

Let us suppose all this to be so. There remains the indisputable fact that the legislative act questioned operates a taking of private property for public use without compensation.

We have then the contract on the part of the state that the riparian may enjoy the water power maintained by his dam for thirty years, but suppose that within the thirty years the dam has become, on account of increased stream flow, a menace to safety, or that, on account of diminished stream flow, it has become an interference with navigation, what then has become of the police power of the state to control the navigable river in the interest of the public.

In this case, we have then the question, not *what* is the law, but *which* is the law?

In Hudson Water Co. vs. McCarter, 209 U. S. 349, Mr. Justice Holmes says,

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded and which becomes strong enough to hold their own when a certain point is reached." (355). He further says, "It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the principles of common law." (357).

Herein we have neither a common law rule against a common law rule, nor a constitutional principle against a constitutional principle. We have an ordinary incidental common law rule set up against the

rule requiring just compensation for private property taken for public use. This is the broad shield of the citizen, of which Mr. Justice Brewer says that it constitutes, "one of the most certain tests of the character and value of the government," and of which Chancellor Kent says, "that this inviolability of private property, even as it respects the acts and wants of the State, *unless a just indemnity be afforded* * * * has frequently been made the subject of expressed and fundamental articles of right in the constitution of government * * *, and "this principle * * * is founded on natural equity and is laid down by jurists as an acknowledged principle of universal law," and of which Mr. Justice Dayton says that it "reaches back of all constitutional privileges; and it seems to have been considered a settled principle of universal law," and Mr. Justice Rodman says "The principle is so grounded in natural equity, that it has never been denied to be a part of the law of North Carolina."

Respectfully submitted,

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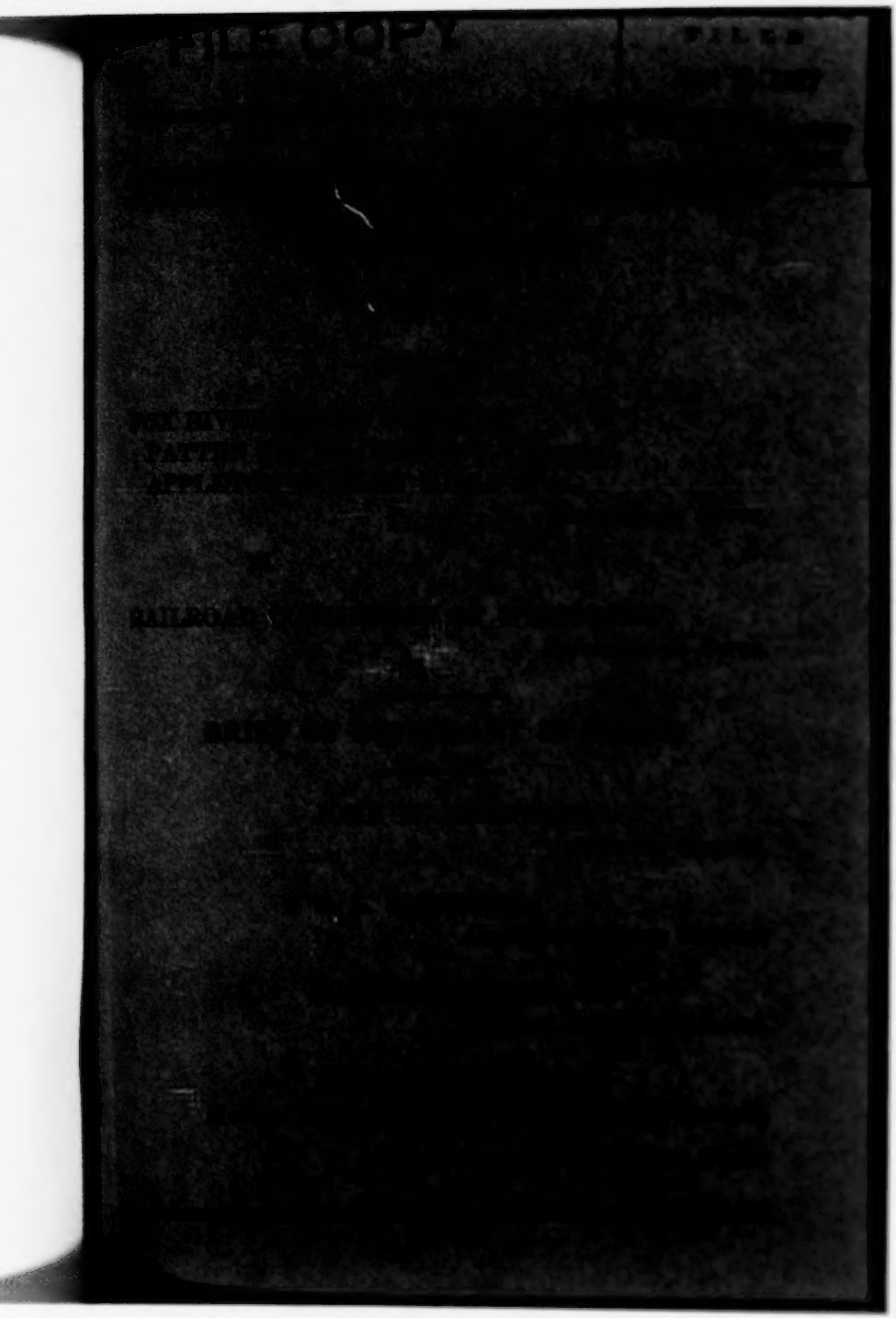

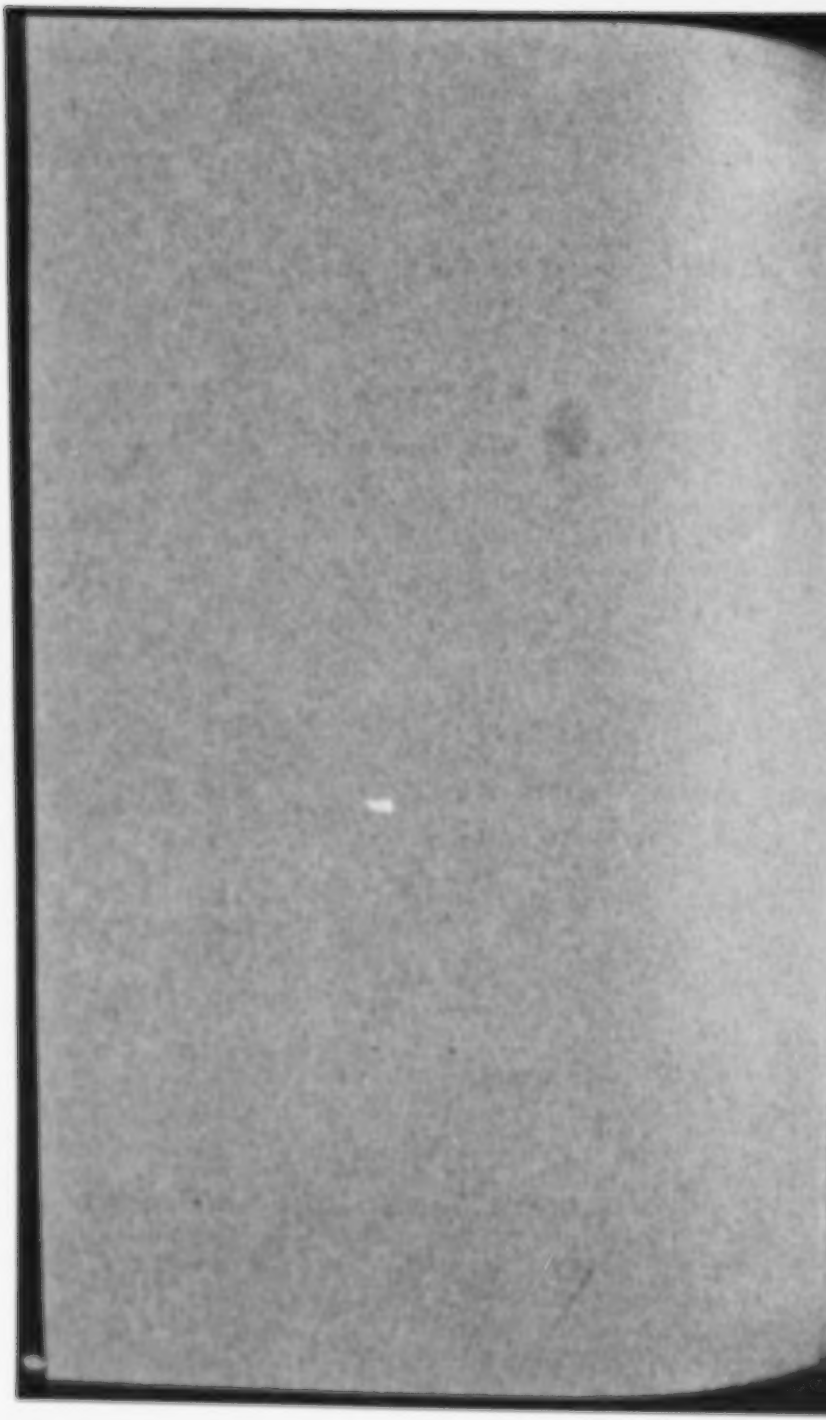

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I.

The Fox River is a meandered navigable stream of the State of Wisconsin. 18

II.

The erection of any dam, bridge or other obstruction over any meandered navigable stream, even though it does not interfere with navigation is a nuisance abateable as such. 18

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III.

The state may authorize the erection of dams over navigable streams for public purposes, other than the imrpovement of navigation, as, for example, to provide a municipal water supply. 19

IV.

In the exercise, at least, of the public right to improve the navigation of a navigable stream, the state may without compensation to the riparian owner impair or totally destroy riparian rights. 20

V.

Public rights in navigable waters are not limited to navigation but include the right of fishery, the right of taking ice, the development of the river for municipal water supply and for all beneficial public purposes. 22

VI.

The undeveloped power of a navigable stream is not a riparian right. The energy of falling water when developed by the erection of a dam is appurtenant to the dam and not to the riparian lands. The dam may only be constructed by the state or under the authority of the state. The energy of falling water developed by means of a dam, if it is capable of ownership, must vest in the state; hence, it follows that the energy so developed had its source, in either (1) something not capable of ownership and therefore no one's property, or (2) the property of the state. 26

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VII.

A riparian owner on a navigable river has no right as such to the developed water power. He cannot build the dam without legislative authority and hence cannot create such power. Apparent exceptions to this rule are cases involving non-navigable streams or cases in which such right may be acquired under the Mills Dam Act. In Michigan, as in Wisconsin, the technical title to beds of rivers is in the riparian owner. In the *United States v. Chandler-Dunbar Company*, a case arising in Michigan, it was held that the riparian owner held no private property in the power capacity of the rapids and falls of the St. Marys River, that whatever substantial private property rights exist in the falls of the stream must come from some right which the company has to construct and maintain such works in the river, such as a dam, walls, dykes, etc., essential to the utlization of the power of the stream for commercial purposes. 27

VIII.

The developed power is appurtenant to the dam and not to the riparian lands. 31

IX.

The state being in a position where it can either deny or grant a permit to construct, operate and maintain a dam whereby the water power capacity of the stream which does not belong to the riparian owner may be utilized may impose conditions under which the right to erect the dam may become effective, and as one of these conditions may insist that the grantee of the permit sell the development on a basis of value, which is determined in advance of the granting of the permit. In granting a permit the state grants a franchise and exacts as conditions for such grant the right to purchase the development. 33

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 492

FOX RIVER PAPER COMPANY,
PATTEN PAPER COMPANY, LIMITED,
APPLETON WOOLEN MILLS ET AL.,
Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF WISCONSIN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

This is an appeal by writ of error from a judgment in the supreme court of the state of Wisconsin, affirming without opinion the judgment of the circuit court of Dane county, Wisconsin, upholding the constitutionality of sec. 31.09, subsec. (3) of the Wisconsin statutes, and dismissing the complaint of plaintiffs in error.

STATEMENT OF FACTS

In 1878 the grantors and predecessors of plaintiffs in error constructed a dam known as the Middle Dam across the Fox river at Appleton, Wisconsin. This structure was erected and has since been maintained by plaintiffs in error, their predecessors, and grantors without legislative authority.

On May 13, 1925 plaintiffs in error presented their application to defendant in error under sec. 31.05, Wisconsin statutes, for a permit to rebuild this dam (T. R. 10). The application was dismissed without prejudice on May 15, 1925 (T. R. 21). On May 21, 1925 the plaintiffs in error renewed their application and sought a permit to operate and maintain an existing dam under sec. 31.07, Wisconsin statutes (T. R. 23). The defendant in error re-examined said application and on May 25, 1925 dismissed it without prejudice, because plaintiffs in error would not submit with the application the proposals called for by sec. 31.09, subsec. (3), Wisconsin statutes (T. R. 23).

Certain conditions under which permits may be issued are stated in sec. 31.09, Wisconsin statutes. This section is as follows:

"Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

"(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

"(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, main-

tained, and operated and used and useful under the permit.

"(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation."

The defendant in error in dismissing the applications asserted that it lacked jurisdiction to honor the application for the permit, since plaintiffs in error failed to file the proposals required by sec. 31.09, subsec. (3), Wisconsin statutes.

Plaintiff in error then commenced an action under the Wisconsin statutes in the circuit court for Dane county, Wisconsin, to review the order of the defendant in error, asserting that they were deprived of the legal and proper use of their water power in the Fox river in violation of section 13, article I of the Wisconsin constitution and article 5 and the 14th amendment of the federal constitution.

Defendant in error answered, alleging that its order violated no constitutional right of plaintiffs in error. To this answer plaintiffs in error demurred, questioning the

constitutionality of sec. 31.09, subsec. (3), Wisconsin statutes. The demurrer was overruled, plaintiffs in error refused to proceed to trial on the merits of the case, and the lower court thereafter dismissed the complaint of plaintiffs in error.

ARGUMENT

This court is without jurisdiction herein

There is no federal question presented nor involved.

The complaint alleges that the action of defendant in error in refusing to hold a hearing and grant the permit deprives plaintiffs in error of the legal and proper use of their water power in violation of article 5 and the 14th amendment of the federal constitution (T. R. 9), but that of itself is not sufficient to confer jurisdiction upon this court.

There was no federal question raised or decided, and judgment as rendered could have been given without deciding it.

There is no opinion of the Wisconsin supreme court herein and under the similar rule hereinafter stated, it may be necessary to consider the questions before the lower court.

Unless a federal right is involved this court will not review a state court's application of local laws.

Palmer v. Ohio, 248 U. S. 32, 34;
Campbell v. Olney, 282 U. S. 352, 354.

Both as to the validity and construction where no federal question is involved, a decision of the highest court of the state is controlling.

Des Moines National Bank v. Fairweather, 263 U. S. 103, 106.

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock v. Memphis*, 20 Wall. 590; *Cook County v. Calumet & Chicago Canal Co.*, 138 U. S. 635."

Eustis v. Bolles, 150 U. S. 361, 366.

Questions as to title to land beneath navigable waters of any state are to be resolved wholly by state law.

Barney v. Keokuk, 94 U. S. 324, 338;
Packer v. Bird, 137 U. S. 661, 669;
Hardin v. Jordan, 140 U. S. 371, 382;
Shively v. Bowlby, 152 U. S. 1, 40, 58;
Scott v. Lattig, 227 U. S. 229, 243;
Donnelly v. United States, 228 U. S. 243, 261;
Norton v. Whiteside, 239 U. S. 144, 153;
McGilvra v. Ross, 215 U. S. 79.

The state may determine what rule shall apply as to the use of waters and riparian rights.

Kansas v. Colorado, 206 U. S. 46, 93, and cases cited *supra*.

In *Donnelly v. United States*, *supra*, this court said, pages 261-262:

"* * * In *Barney v. Keokuk*, 94 U. S. 324, 338, it was held that it is for the States to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto. The court, speaking through Mr. Justice Bradley, said (94 U. S. 338): 'The confusion of navigable with tide water, found in the monuments of the common-law, long pre-

vailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.* In our view of the subject the correct principles were laid down in *Martin v. Waddell,* 16 Pet. 367; *Pollard's Lessee v. Hagan,* 3 How. 212; and *Goodtitle v. Kibbe,* 9 Id. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief,* 12 Id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the States by their inherent sovereignty,* and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated.'

"The doctrine thus enunciated has since been adhered to. *Packer v. Bird,* 137 U. S. 661, 669, *Hardin v. Jordan,* 140 U. S. 371, 382; *Shively v. Bowlby,* 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co. v. Water Commis-*

sioners, 168 U. S. 349, 358; *Scott v. Lattig,* 227 U. S. 229, 243."

Such an issue being a state issue so-called, involving the state's control over navigable waters and the rights of riparian owners, is in no sense a federal question and may not be depended upon to bring this matter to the attention of this court.

"* * * However, that may be, we think that, when we find it unnecessary to decide any Federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error. This was the judgment pronounced in *Klinger v. Missouri,* 13 Wall. 257; *N. O. Waterworks v. Louisiana Sugar Co.,* 125 U. S. 18; *Kreigher v. Shelby Railroad,* 125 U. S. 39; *De Saussure v. Gaillard,* 127 U. S. 216; *Hale v. Akers,* 132 U. S. 554; *Hopkins v. McLure,* 133 U. S. 380; *Johnson v. Risk,* 137 U. S. 300, 307; and in numerous other cases which it is unnecessary to cite."

Eustis v. Bolles, 150 U. S. 361, 370.

The decision of the lower court upon a purely state question is adequately sustained in the record and therefore this court will not assume jurisdiction

If it appear that the court did not, in fact, base its judgment upon an independent ground or where it does not appear on which one of two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself, to sustain the judgment, this court will not assume jurisdiction.

Klinger v. Missouri, 13 Wall. 257, 263;
Johnson v. Risk, 137 U. S. 300, 306, 307;
Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 69;
Allen v. Arguimbau, 198 U. S. 149, 154-155;
Bachtel v. Wilson, 204 U. S. 36, 40;

Adams v. Russell, 229 U. S. 353, 357-60;
Cuyahoga Power Co. v. Northern Realty Co. et al., 244 U. S. 300, 303.

There is no state supreme court opinion herein nor was there any in *Klinger v. Missouri, supra, Johnson v. Risk, supra, Allen v. Arguimbau, supra, Bachtel v. Wilson, supra,* and *Cuyahoga Power Co. v. Northern Realty Co. et al., supra.* In these cases the court examined the record to ascertain whether there was an independent ground upon which the state court decision would be upheld, and if so, the jurisdiction of this court would not attach.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Eustis v. Bolles, 150 U. S. 361, 366.

"Although it does not seem, from the report of this case in the Missouri Reports that the point taken before us was raised or passed upon by the Supreme Court of that State, yet being found in the record, and arising out of the transactions at the trial, as exhibited in the bill of exceptions, it is our duty to examine it. * * *."

Klinger v. State of Missouri, 13 Wall. 257, 261.

"The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or

treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."

Klinger v. Sta of Missouri, supra, page 263.

In *Johnson v. Risk,* 137 U. S. 300, the record showed that, in the supreme court of Tennessee, two grounds of defense had been urged, one of which involved the construction of the provisions of the federal bankrupt act of March 2, 1867, and the other the bar of the statute of limitations of the state of Tennessee; and this court held that where, in an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court.

The court said at page 307:

"Where there is a federal question, but the case may

have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable. *Klinger v. Missouri,* 13 Wall. 257. But where a defense is distinctly made, resting on local statutes, we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defense."

In *Cuyahoga River Power Co. v. Northern Realty Co. et al.,* 244 U. S. 300, at page 304 it was stated:

"* * * But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen v. Arguimbau,* 198 U. S. 149, 154-155, where a writ of error to the Supreme Court of Florida was dismissed, as follows: 'The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble v. Bellingham Bay Land Company,* 163 U. S. 63; *Klinger v. Missouri,* 13 Wall. 257; *Johnson v. Risk,* 137 U. S. 300.' *Bachtel v. Wilson,* 204 U. S. 36; *Adams v. Russell,* 229 U. S. 353."

In *Bachtel v. Wilson,* 204 U. S. 36, 40:

"But we are not called upon to decide which is the correct interpretation. The Supreme Court of a State is the ultimate tribunal to determine the meaning of its local statutes. We are not to assume that that which

seems more reasonable to us also seemed more reasonable to and was adopted by it. Before we can pronounce its judgment in conflict with the Federal Constitution it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was. It surely is not unworthy of consideration that the legislature, having before it the question of punishment for offenses committed by banking officers, having made provision therefor by one section in which it used the term 'any banking company,' may have believed that thereby it had included in its punitive provisions all banking institutions, and that a repetition of that section in other statutes was unnecessary. We do not decide that this was so, but we do hold that in view of the silence of the Supreme Court we are not justified in assuming that it held that it was not so."

The opinion of the judge of the circuit court of Dane county, Wisconsin, indicates that this act is an elective act (T. R. 34), and also that the act is constitutional (T. R. 32, 3, 4, 5). It may be elective in two ways. The plaintiffs in error may use the land adjoining the stream obtaining necessary power through steam, or by coming under the act and obtaining water power permits. There is no interference with the use of the land. There is, furthermore, no obligation to use the water power, but if plaintiffs in error as riparians choose so to do, they shall comply with the terms of the act.

"A complete answer to this claim is found in the elective or voluntary character of the Wisconsin Compensation Act. That act provides that every employer who has elected to do so shall become subject to the act, that such election shall be made by filing a written statement with the commission which shall subject him to the terms of the law for a year until July 1st following and to successive terms of one year unless he withdraws. Wisconsin Stats. secs. 2394-3, 4, 5. It is conceded by the

counsel for the plaintiffs in error that the act is elective, and that it is so is shown by the decisions of the Wisconsin Court in *Borgnis v. Falk Co.*, 147 Wis. 327, 350, 37 L. R. A. (N. S.) 489, 133 N. W. 209, 3 N. C. C. 649, and in the present case, 185 Wis. 127, 200 N. W. 775. If the employer elects not to accept the provisions of the compensation act, he is not bound to respond in a proceeding before the Industrial Commission under the act, but may await a suit for damages for injuries or wrongful death by the person claiming recovery therefor, and make his defense at law before a court in which the issues of fact and law are to be tried by jury. In view of such an opportunity for choice, the employer who elects to accept the law may not complain that in the plan for assessing the employer's compensation for injury sustained, there is no particular form of judicial review. This is clearly settled by the decision of this court in *Hawkins v. Bleakly*, 243 U. S. 210, 216, 61 L. ed. 678, 684, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959."

Booth Fisheries Company et al. v. Industrial Commission of Wisconsin et al., 271 U. S. 208, 210.

One may not, upon electing to come under the act, assert the unconstitutionality thereof.

Booth Fisheries Co. et. al. v. Industrial Commission of Wisconsin et al., supra, and cases therein cited on page 211.

The answer does not raise estoppel as a defense. The Wisconsin rule is that when the pleadings show all of the facts out of which the estoppel arose, it is not incumbent upon the pleader especially to plead estoppel.

Bank of Antigo v. Ryan, 105 Wis. 37, 40;
Lawton v. Racine, 137 Wis. 593, 600;
Karlen v. Trickle, 189 Wis. 148, 153.

In the *Karlen* case, *supra*, the defense of estoppel was

not urged before the lower court. Yet, such claim was received by the Wisconsin supreme court as controlling therein.

The Wisconsin rule likewise is that one may not be heard to complain that an act under which he seeks advantages is unconstitutional.

State ex rel Kellogg v. Currens, et al, 111 Wis. 431

In the *Kellogg* case, *supra*, Kellogg the appellant, was the holder of a diploma from a Chicago medical school. Under the Wisconsin statutes, prior to the amendment, he would have been entitled to commence practice either upon production of the diploma which he held or upon passing examination. By an amendment both diploma and examination were made prerequisite to a license to beginners. Kellogg presented his diploma with the required fee. The board refused to grant him a license, insisting that he take an examination. He petitioned for and the court issued an alternative writ of mandamus. Kellogg thereafter appealed from an adverse decision of the lower court contending that the amending act was void, because it violated section 1, article I of the Wisconsin constitution and section 2, article IV and the 14th amendment of the federal constitution. The court stated on page 442:

> "* * * His only right to a certificate depends upon the validity, therefore, of a statute containing this provision, and he cannot be heard to assail its validity. *Hart v. Folsom* (N. H.), 47 Atl. Rep. 603. Were he being persecuted for practicing medicine without a certificate, he would be in a different situation."

In *Pera v. Shorewood, supra*, when plaintiff filed his claim with the Village of Shorewood for compensation for damages caused by the districting of the village, he

asserted the invalidity of the ordinance thereof. The claim as filed, contained this statement:

> "This claim is submitted and filed without prejudice to any of the rights and privileges of the claimant to contest the validity of said ordinance."

He claimed that the ordinance was unconstitutional; that the statute dedicating the power to the village to pass an ordinance dividing the village into districts was void. The court said, page 263:

> "This reservation may well preserve the right of the plaintiff to contest the validity of the ordinance in a proper proceeding, but it cannot have that effect in the proceeding now before us. As stated, the filing of the claim asserted the validity of the ordinance and the statute under which it was passed, otherwise the plaintiff could not contend that his claim had any validity. When he took his appeal to the circuit court from its disallowance by the village he did so as an aggrieved party, again asserting by his acts the validity of the ordinance. So he came into court relying upon the ordinance as the valid basis for his claim. Having instituted his action upon the sole basis of the validity of the ordinance, he cannot now seek to maintain it by asserting the invalidity of that which enabled him to come into court. This case is parallel with that of *Hurley v. Commission of Fisheries*, (U. S.) 42 Sup. Ct. 83, decided by the supreme court of the United States December 5, 1921, where it was held that a plaintiff could not claim under a statute and assail it in the same proceeding. To do so would enable parties to make use of a statute as a valid one during one stage of an action, and then, upon a certain point therein being reached, continue it upon the basis that it is invalid because from thence on it seems to be more advantageous to claim its invalidity. This is a species of legal somersault or suicide that courts will not tolerate. Parties cannot pursue two inconsistent remedies in the same action. 9 Ruling Case Law, 958."

There have been numerous adjudications in Wisconsin wherein one having received benefits under an act has been later estopped to deny the validity thereof. The foregoing citations, however, show that estoppel arises though the claimant has received no benefit and sets up the unconstitutionality of the act in proceedings from which he expects to derive advantages.

It is apparent from the complaint of plaintiffs in error and exhibits made a part thereof that they sought a permit to rebuild, operate, and maintain an existing dam, yet asserted that some of the conditions set out in the statutes with which they would have to comply to obtain the permits are unconstitutional. They are clearly estopped to so claim in Wisconsin, and this defense is adequate to sustain the decision of the lower court.

Estoppel, either by itself or accompanied by ground supporting a federal question, deprives this court of the power to disturb the judgment of the lower court.

Enterprise Irrigation District et al. v. Farmers Mutual Canal Co. et al., 243 U. S. 157, 163;
Hurley v. Commission of Fisheries, 257 U. S. 223, 225;
Kansas City, Memphis & Birmingham Railroad Co. v. Stiles, 242 U. S. 111, 117.

Estoppel may stand by itself, apart from that contention of unconstitutionality and conflict with due process clause, since the due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.

Sayward v. Denny, 158 U. S. 180, 186;
Central Land Co. v. Laidley, 159 U. S. 103, 112;
Castillo v. McConnico, 168 U. S. 674, 683-684;

Enterprise Irrigation District et al. v. Farmers Mutual Canal Co. et al., 243 U. S. 157, 163.

The question presented, to wit: Estoppel, aside from its relation to the validity of the lower court's adjudication turned upon the water power act, being elective, and upon the law of the state, in which event the decision of the state court is controlling.

Preston v. Chicago, 226 U. S. 447, 450;
St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S. 419, 427;
Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116.

The Wisconsin supreme court not having filed any opinion and it appearing from the record that the lower court considered the act elective which would thereupon render one estopped to claim under it and attack it in the same breath, the decision of the state court, though it appears that it discussed constitutionality, may stand on estoppel, even though a federal question may be involved.

In *De Saussure v. Gaillard*, 127 U. S. 216, 234, the general rule is stated:

> "* * * that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. * * *"

These elements are lacking, and no federal question having been considered or decided and if considered, being unnecessary to the determination of the cause, the judgment as rendered shall stand.

In *In re Crawford County Drainage District*, 182 Wis. 404,

the Wisconsin Railroad Commission was called upon to determine whether the proposed drainage district would materially impair the navigability of or any other public right in any waters or streams that may be navigable. The commission, though the proof showed that the area to be drained—a large acreage of the Mississippi bottoms above Prairie du Chien, Wisconsin—consisted of ponds and sloughs, which had been meandered by the government, that the waters were navigable for small craft and in fact navigated by fishermen, hunters, and others, that a ferry plied between Iowa and Wisconsin, its course being in part through one of the large sloughs, and that the public rights of trapping, hunting, fishing, and navigation would not be totally destroyed, but damaged by the projected work, found that the proposed work would not materially impair any other public right in or public use of such waters or streams.

The lower court confirmed the preliminary report of the drainage commissioners, and directed them to proceed with the drainage project, thus effectuating the organization of the district. An appeal from that order was taken. The Wisconsin Supreme Court reversed that order and remanded the cause with directions to dismiss the proceedings for the establishment of such district, holding that navigable waters could not be destroyed for any drainage scheme.

It is interesting to note that this court thereafter denied the application of the proposed plaintiff in error for a writ of certiorari, refusing to take jurisdiction.

The questions involved were evidently considered state questions, lacking of a Federal nature, as sufficient though Federal questions were present, to sustain the decision of the state court.

See, *Crawford County Levee and Drainage District, etc., v. J. R. Hutson et al.*, 264 U. S. 598.

I.

The Fox River is a meandered navigable stream of the State of Wisconsin.

The Fox River in the township in which the dam of plaintiffs in error is located is a meandered navigable river. (1) The plaintiffs in error admit that the dam in question was constructed across the Fox River without legislative authority. The proceedings before the Railroad Commission of Wisconsin upon which the suit herein is based was in fact taken for the purpose of legalizing the dam under the statutes of Wisconsin.

II.

The erection of any dam, bridge or other obstruction over any meandered navigable stream, even though it does not interfere with navigation is a nuisance abatable as such.

The erection of any dam, bridge or other obstruction over any meandered navigable stream was prohibited by law from the earliest territorial days (1840) down to the present time. Such obstructions were declared to be nuisances subject to be abated as such by the state or any citizen. (2)

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(1) Maps of Original Survey of Township 21 North of Range 17 East of the Fourth Principal Meridian in Northwest and Wisconsin Territories, signed by the Surveyor General on July 21, 1835 and December 31, 1844, respectively, on file in the office of the Commissioner of Public Lands at Madison.
Wisconsin et al. v. Fox River Paper Co., 82 Wis. 647.

In 1858, similar statutes prohibiting obstructions in all streams navigable in fact and providing a penalty for violation thereof, and giving a right of action for the recovery of damages to any persons injured by such offense were enacted. This is still the law. (3)

In an early case (1872) it was held that the erection and maintenance of a dam without legislative permission is unlawful, even though it does not interfere with navigation and in fact may prove to be a benefit to navigation. (4)

This has been the uniform ruling of the supreme court. (5)

III.

The state may authorize the erection of dams over navigable streams for public purposes, other than the improvement of navigation, as, for example, to provide a municipal water supply.

The state may, however, in the exercise of its jurisdiction grant permission to erect dams across navigable streams under such restrictions as will protect the public rights in public waters. (6)

Such authorization may be made for a public purpose other than the improvement of navigation, as, for example, to provide a municipal water supply. (7)

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(2) History of State Legislation, the Appendix to this brief.
(3) History of State Legislation, the Appendix to this brief.
(4) *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61, 67.
(5) *Barnes v. Racine*, 4 Wis. 474;
In re Eldred, 46 Wis. 530;
Cross Co. v. Little Suamico, 74 Wis. 652.
(6) *Stoughton v. State*, 5 Wis. 291.
(7) *State v. Eau Claire*, 40 Wis. 533.

IV.

In the exercise, at least, of the public right to improve the navigation of a navigable stream, the state may without compensation to the riparian owner impair or totally destroy riparian rights.

Riparian rights are subordinate to public rights in navigable waters. It has at least been uniformly held that because of the public right of navigation in navigable waters riparian rights may be greatly restricted or totally destroyed by the exercise of the public right to improve the stream and that the riparian is not entitled to compensation for any losses resulting from such improvements. The following cases illustrate the proposition.

Plaintiff purchased frontage for the purpose of erecting a saw mill; the chief value of the land was accessibility to the river. Defendant authorized by the legislature to improve the navigation of the river constructed a line of piers, booms and piles along the river in front of plaintiff's land and completely appropriated and blocked up the river bed in front of plaintiff's land, rendering it impassable and unnavigable, except in a channel immediately in front of plaintiff's premises, through which the water was made to flow with increased velocity. The approach to plaintiff's land was rendered inaccessible for logs and lumber. Chief Justice Ryan held that the riparian right rests "in the absence of prohibition upon a passive or implied license by the public, is subordinate to the public use and may be regulated or prohibited by law. *Dietrich v. Railway Co.*, 42 Wis.248; *Stevens Point Boom Co. v. Riley*, 44 Wis. 295." (8)

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(8) *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 322 (1879).

Plaintiff acting under authority granted in 1864 to improve the navigation of the Black River crossed by a dam the entrance of Black Snake River, a navigable stream which diverged from the main channel of Black River and rejoined it at a point lower down. Defendant was organized by special act in 1872 for the purpose of manufacturing lumber in various forms and also to improve the navigation of Black River within specified limits. Defendant was also a riparian owner on Black Snake River and maintained in front of its banks booms, piers and rafting works. In order to restore the navigable character of Black Snake River, defendant tore down the dam at the entrance. Plaintiff's bill seeking to enjoin the defendant from further interfering with its dam was sustained. The court says:

"*The waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water* (p. 681). * * * The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow, is as perfect against everybody except the state, or some person or corporation standing in its stead, as it is in the case of unnavigable streams; and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership; and the right of the state to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the state or in the riparian owner. * * * And, as against the state, or the plaintiff acting in its stead, we think this court has determined that the riparian owners on the banks of the Black River, or the Black Snake River, have not the absolute right to have the

waters of said river flow as they were accustomed to flow in front of or through their lands." (p. 682) (9)

Plaintiff built a dam under legislative permission. Afterwards the defendant was authorized to improve the navigation of the river and to build flooding dams. By reason of a dam fourteen miles above plaintiff's dam, the water was held back and let out periodically so as greatly to impair the plaintiff's water power. Plaintiff's bill was dismissed, the court holding that the Oconto River being a navigable stream and a public highway the legislature could legally authorize the improvement thereof by the construction of flooding dams in such stream in aid of navigation, and that owners of mill dams built across the stream under prior statutory authority have no right of action for any impairment of the efficiency of their water powers resulting from the proper use of such flooding dams. (10)

V.

Public rights in navigable waters are not limited to navigation but include the right of fishery, the right of taking ice, the development of the river for municipal water supply and for all beneficial public purposes.

The scope of the public right of use is not merely limited to navigation.

In the early case of *Wisconsin River Improvement Co. v. Lyons,* 30 Wis. 61, it was held that the dam was a nuisance, irrespective of whether it interfered with navigation. It must have been held that the public right extended beyond the use of the stream for navigation.

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(9) *Black River Improvement Co. v. La Crosse, etc., Co.,* 54 Wis. 659, 681, 682 (1882).

(10) *Falls Manufacturing Co. v. Oconto Co.,* 87 Wis. 134, 150, 151 (1894).

In *Willow River Club v. Wade* (11), which involved the question whether to take fish out of a public stream comes within the scope of public rights in such waters, Judge Marshall in concurring in the decision, says:

> "Though such title (that is, the soil beneath the rivers) by force of state policy has passed from it to private ownership, such ownership is of such a qualified character as not to in any way interfere with the character of the streams as public waters; not public in the sense of such rivers as at common law were merely subject to the right of passage, but public by the common law test of navigability." (p. 104)

In other words, even though the technical title to the bed is in the riparian owner, yet such waters have lost none of the incidents of public waters at common law.

In Wisconsin, the title to the beds of lakes is vested in the state (*McLennan v. Prentice*, 85 Wis. 427, 442; *Priewe v. Wisconsin State L. & I. Co.*, 93 Wis. 534, 546) and the court, commenting, says:

> "The title of the state to submerged lands under navigable waters, whether lakes or rivers, came to it at the same time subject to the same incidents, and for the same purposes, and must necessarily be governed by the same rules." (pp. 113, 114) (12)

In *Rossmiller v. State*, it was held that the taking of ice is a common right in navigable lakes.

It may be stated generally that the scope of public rights in public waters has never been exhaustively determined in Wisconsin. In general, it includes all rights at common

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(11) 100 Wis. 86, 104.
(12) 100 Wis. 86, 113-114.

law in navigable waters (13), and particularly the right of navigation. (14) It also includes fishing. (15) Also taking of ice. (16)

It would seem to include the right to use water by a municipality for domestic water supply. (17)

Nowhere has it been decided that the public use does not include the use of navigable waters to develop power for public purposes.

In *Black River Improvement Co. v. La Crosse, etc., Co.* 54 Wis. 659, the court says (pp. 680, 682):

> "In *McKeen v. Delaware Division Canal Co.*, 49 Pa. St. 424, it is held that 'every one who buys property upon a navigable stream purchases subject to the superior rights of the commonwealth to regulate and improve it for the benefit of all her citizens. If, therefore, he chooses to place his mills or his works, for the qualified use he may make of the water, within the limits or influence of high water, he does so at his own risk, and cannot complain when the commonwealth, for the purpose of improvement, chooses to maintain the waters of the stream at a given height within its channel.' The same doctrine of the right of the state to control the navigable waters of the state, without liability for damages, is held in the following cases in that state: *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Monongahela Bridge Co. v.*

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(13) *Willow River Club v. Wade*, 100 Wis. 86;
Pewaukee v. Savoy, 103 Wis. 271, 274;
Illinois Steel Co. v. Bilot, 109 Wis. 418, 425;
Rossmiller v. State, 114 Wis. 169, 186.

(14) *Jones v. Pettibone et al.*, 2 Wis. 225, 235 (1853);
Boom Co. v. Reilly, 46 Wis. 237, 243;
Cohn v. Boom Co., 47 Wis. 314, 325;
Black River, etc., Co. v. La Crosse Co., 54 Wis. 659, 680, 681, 682.

(15) *Willow River Club v. Wade*, 100 Wis. 86, 97, 99, 101, 102, 104;

(16) *Rossmiller v. State*, 114 Wis. 169, 186, 187;

(17) *Attorney General v. Eau Claire*, 40 Wis. 533, 540, 541.

Kirk, 46 Pa. St., 112; and many other decision of the courts of that state hold the same doctrine.

"In the case of *Fitchburg Railroad Co. v. Railroad Co.,* 3 Cush. 58-88, Chief Justice Shaw says: 'It is incident to the power of the legislature to regulate a navigable stream so as best to promote the public convenience; and if, in doing so, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria.*' * * * These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. * * *.

"* * * Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this case."

Let us refer again to the case of *Willow River Club v. Wade,* 100 Wis. 86, as indicating that navigable waters in Wisconsin are public not only for navigation but for other public uses. Judge Marshall, in concurring with the opinion of the court, says this (103-104):

"I concur with the decision of the court, but regard the opinion of the Chief Justice as being so framed as to lead to the belief that the common right of fishing in this state is a mere incident to the right of navigation and that defendant is not liable because he was navigating the stream in a boat at the time of the act complained of, in short, that he was where he had a right to be in the exercise of the right of navigation and therefore that he was not a trespasser upon the plaintiff's lands. In my judgment the right of fishing in navigable waters is common to all and exercisable so far as it can be done

without trespass on the banks thereof, whether the person exercising such right be at the time navigating the stream in a boat or otherwise floating upon the surface of the water or traveling upon the bed in the shallows or anywhere in any manner between the lines of ordinary high-water mark."

In the early days the streams of Wisconsin were used merely for navigation and the floatage of logs. The greater number of dams were constructed for the improvement of navigation and to facilitate log driving. In recent years, after the timber was cut and the lands developed, dams were more frequently built for the purpose of developing power. The many special acts of the legislature authorizing the construction of dams were ostensibly to improve the navigability of the river but were in fact for the purpose of developing power. This probably explains the lack of extensive judicial discussion of other public rights in public waters. The state holds the navigable waters in its sovereign and governmental capacity for all public uses. It would seem that to develop a stream for the purpose of power falls within the public right of use of navigable streams, and is superior to the rights of riparian owners.

VI.

The undeveloped power of a navigable stream is not a riparian right. The energy of falling water when developed by the erection of a dam is appurtenant to the dam and not to the riparian lands. The dam may only be constructed by the state or under the authority of the state. The energy of falling water developed by means of a dam, if it is capable of ownership, must vest in the state; hence it follows that the energy so developed has its source in either (1) *something not capable of ownership and therefore no one's property, or* (2) *the property of the state.*

The defendant in error contends that the undeveloped

power is not a riparian right. Even though it be admitted for the sake of argument that the improvement of navigable water for the purpose of creating hydro power is not a public use, superior to riparian rights, the plaintiff in error could not claim compensation for the undeveloped power for the following reasons:

That the energy in falling water in a navigable stream is not a riparian right;

That developed power is appurtenant to the dam and not to the riparian lands;

That a dam may be constructed only by the state or under the authority of the state;

That the dam makes available the energy of falling water and that the energy so developed has its source, therefore, in either (1) something not capable of ownership and therefore no one's property, or (2) the property of the state;

That since the dam can be constructed only by the state itself, or under the authority of the state, and since the power which is appurtenant to the dam is taken from no private owner but is contributed by the state itself, which, together with the grant to build the dam is a material contribution to the developed power, the state may attach such terms and conditions to its franchise as it will.

VII

The proposition that the energy in falling water in a navigable stream is not a riparian right was squarely presented in *United States v. Chandler-Dunbar Company*, 229 U. S. 53. An act of Congress provided that all lands and property on the St. Mary's river in the State of Michigan should be taken by the Secretary of War, either by condemnation or purchase, for improving the navigation of the river. By the laws of Michigan, as in Wisconsin, the

technical title to the bed of a navigable river is in the riparian owner. The Chandler-Dunbar Company claimed that the undeveloped water power of the river in excess of the supposed requirements of navigation is a riparian right. The District Court of the United States upheld this contention and awarded $102,000 for the upland taken and $550,000 for the undeveloped water power.

The United States Supreme Court, on appeal, held that the company had no private property in the water capacity of the rapids and falls of the St. Mary's River and disallowed the claim in toto.

The claim was made in that case, as is contended here by plaintiffs in error, that although the right of navigation is dominant, yet that the United States may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation and that the flow of the stream is not so diminished as to have less than every possible requirement of navigation, present or future.

The court said:

"This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the Fifth Amendment, compensation must be made." p. 61.

"* * * This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a

substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers." p. 62.

And on page 66:

"But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same."

On page 69, the court gives the reason why the undeveloped power does not constitute private property right:

"It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the Government not only takes the land but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows, has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

"Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such

works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. We may put out of view altogether the class of cases which deal with the right of riparian owners upon a non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but if the effect was not injurious to the property of those above or to the equal rights of those below, none could complain, since no public interest would be affected. We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or non-navigable streams as between each other. Nor need we consider cases cited which deal with the rights of riparian owners under state laws and private or public charters conferring rights. That riparian owners upon public navigable rivers have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the exercise of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river. *Gibson v. United States*, 166 U. S. 269; *Transportation Co. v. Chicago*, 99 U. S. 635. It is for Congress

to decide what is and what is not an obstruction to navigation; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421; *Union Bridge Co. v. United States*, 204 U. S. 364; *Philadelphia Co. v. Stimson*, 223 U. S. 605."

VIII.

The developed power is appurtenant to the dam and not to the riparian lands.

In *Smith v. Ford*, 48 Wis. 115 (1879), it was held in effect that power developed by a dam created by legislative authority is appurtenant to the dam and not appurtenant to the riparian lands. In this case the original owners of the lots on a navigable stream built a dam, which raised a head of water in the stream. Later they sold and leased the right to use water from the dam to various persons who on behalf of themselves and their heirs covenanted to contribute to the maintenance of the dam in proportion to the amount of water furnished and undertook to maintain the dam forever, but the deed conveyed no other interest in the adjoining lots.

Still later, the owners conveyed the lots upon which the dam abutted on one end.

It was held on p. 168 that there was a severance of the ownership of the dam itself and the power created thereby from the mere ownership of the lots and that the grantee of the lot, as riparian owner, had no right to the water power.

Commenting, the court says: "It appears that the owners of lot 2, block 40, and the lands adjoining the river on the east side thereof where the dam is now situated obtained from the state a right to construct a dam across the river at that point for hydraulic purposes and to sell and lease the right to use the water from such dam. Would this grant from the state owners of said land, though owning the soil under the river, had no power to construct the dam thereon." (p. 168)

In *Lawson v. Mowry*, 52 Wis. 219 (1881), the courts says, on page 237:

"It was the legislature which gave the authority to obstruct the channel of the river by the building of the dam and canal, and to make use of the water power thereby created for navigation, and the surplus for hydraulic purposes. The water power thus created by the dam was not necessarily confined to the use of it at the dam. It is common to conduct water from a pond created by a dam by means of artificial channels, in order to make available the increase of the head by reason of the additional fall in the bed of the stream below the dam. The embankment or land between such artificial channel and the bed of the stream is, nevertheless, as necessary to preserve the water power as the dam itself. It is, in effect, nothing less than a wing of the dam. The canal, down as far as the lock, is in effect nothing less than an enlargement or arm of the pond created by the dam. It is the fall of the water which gives the power, and the power which gives the value for hydraulic purposes. The right to create and maintain the power, as well as the canal, was authorized by legislative grant to Doty, Reeds and their associates; and, to be rightfully enjoyed by others, it must be derived from them or some of them.

"By means of the dam, canal, embankment and lock, the power derived from the surplus water could be made available at the lots in question by means of an artificial channel; but the right to create such channel and use such power at the lots was not derived exclusively from the ownership of the lots themselves, but reached back to the authority to create and maintain the dam, canal and lock, and to use the surplus water for hydraulic purposes."

In an early case *Wall v. Cloud*, 22 Humphreys' Report 181 (Tenn.) (1842), it was held that where Cloud conveyed by deed to Wall the ground on which the abutment of a dam stood with all and singular the rights and privileges

thereto belonging that the deed conveyed not only the ground on which the abutment stood but also the entire and exclusive use of all water power created by the erection of the dam.

IX.

The state being in a position where it can either deny or grant a permit to construct, operate and maintain a dam whereby the water power capacity of the stream which does not belong to the riparian owner may be utilized, may impose conditions under which the right to erect the dam may become effective, and as one of these conditions may insist that the grantee of the permit sell the development on a basis of value, which is determined in advance of the granting of the permit. In granting a permit the state grants a franchise and exacts as conditions for such grant the right to purchase the development.

The state, because of its interest in the stream and its right to refuse permission for the erection of the dam, stands in a commanding position for bargaining with the owner of the upland. Relatively it stands in the same position as the owner of the upland would, should the state approach him and offer to buy the upland. The owner could refuse to do so. . In like manner the state is not required to grant the license to erect the dam. Being in that position, it can impose the terms under which it will grant the right, just as the municipality dealing with a public service corporation may impose the terms and conditions under which it will grant a franchise for the use of the public street. The Wisconsin statute outlines the terms and conditions under which the grant will be made. One of these terms provides that the grantee of the permit shall consent to a recapture of the development by the state at the end of thirty years and

stipulates the method whereby the compensation to the grantee shall be determined. By the method of determination provided for in the statute, the parties are doing no more than persons contracting with each other do when they fix and establish the damages for a breach of a contract or fix the price of property in an option that may be exercised in the future. In either instance the actual damage, or the actual value may or may not be greater at the time of taking, but the parties desiring definiteness and certainty in their contract, may agree to fix this item at the time that the other terms of the contract are agreed upon. This is exactly the situation of the state and the proposed grantee. Neither can tell whether the development will be more valuable or less valuable thirty years from that date. The state relinquishes a valuable right, and in consideration thereof demands that it may recapture and repurchase the development which it authorizes and to which it contributes. In order that it may know what its rights are, it also imposes a further condition upon the contract, that the method of determining the value of the development at that time shall be fixed and certain. The owner of the upland has the option to accept the terms which the state offers for its protection or to refuse to accept them, just as a utility corporation proposing to enter a city has the option of accepting the franchise tendered by the city, or of rejecting it. In either case, a valid contract may be entered into, which becomes binding on both parties. *Superior Water Co. v. Superior*, 263 U. S. 125, at 134 and 135 and cases there cited. Nor is this provision unfair for it insures to the grantee of the permit compensation upon an agreed basis if the state should not desire to extend the permit beyond thirty years, as it might. The provision requires the state either to permit the operation of the development beyond the thirty years

or to compensate the grantee for the development. If the purchase feature were not incorporated in the statutes, and the statutes only allowed a thirty year period, then it would mean that at the end of thirty years, when the permit had expired, the state could direct the grantee to remove the dam. Under such circumstances he would suffer great loss, the value of his development would be destroyed, and the value of the upland depreciated. In place of this, however, the state, in effect, says rather than require you, the grantee, to do so, it reserves the option to purchase the development at a figure which shall be specified in the contract. Such a contract is entirely fair, and certainly not open to any constitutional objections.

X.

The cases cited by the plaintiff in error do not sustain the propositions for which they are cited.

The cases cited on page 10 of the brief of plaintiffs in error which they claim sustain a rule that the undeveloped water power is a property right as against the state does not uphold such contention. We will discuss these cases in their order.

The Fox River Flour and Paper Co. v. Kelley et al., 70 Wis. 286 (1887). This case deals only with the rights of riparian owners upon a navigable stream, as between each other. In 1849, L and S were the owners of a wing dam on the north side of the Fox river at Appleton, from which wing dam a canal was constructed parallel to the river for a distance of some 1200 feet through block 14. The defendant is the owner of lot 8 in block 14 and claims title through his remote grantor S. The plaintiff is the owner of the said wing dam and all other structures necessary to develop the power and the canal. Plaintiff claims title through its remote grantor L. The defendants claim

to be entitled to use the flowing water in the canal for the purpose of driving the machinery of his mill.

The sole question in this case is whether the defendant has any rights to the water in the canal by reason of the fact that he owns the land through which the canal runs.

It is undisputed that after the wing dam and works and canal had been completed by an agreement between L and S, that L took all of the works and S took block 14.

After stating certain elementary doctrines, among which is the doctrine that "every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration," the court says (p. 294):

> "That defendants as riparian proprietors only have the right to the natural flow of the water of the river by their lot; also, as incident to their ownership of the lot, they have the right to utilize any fall in the stream in its natural state, as it passes by their lot, for the purpose of a water power. This is the full extent of their rights as riparian proprietors owning the lot on the river below the water power."

The court then holds that the ownership of the land does not give defendants any rights to the water power developed by the dam. (p. 305)

Green Bay and Mississippi Canal Company v. Kaukauna Water Power Co., 70 Wis. 635 (1887), and the same case on appeal in 142 U. S. 254 (1891), deals with a situation where the plaintiff became the owner of the surplus power created by a dam which is a part of the work of improving the navigation of the Fox river, undertaken by the State of Wisconsin. The controlling works and mill race are located on the north side of the river. The defendants are the owners of riparian lot 5, located on

the south side of the river, upon which the south end of the dam abuts, and extending from the end of the dam is an embankment on said lot 5 which confines the waters of the mill pond.

After the completion of the dam, defendants cut a canal on their own lands and threatened to cut the embankment also on their own land and draw water from the pond for hydraulic purposes for their own use, claiming to have this right as riparian proprietors.

The state Supreme Court says: (p. 649) "The controlling question is: Has the defendant the right to cut the embankment?"

The court then holds: That plaintiff owns all of the surplus water power created by the improvement. (p. 651) That by the legislative act, the defendant was deprived of all water power created by the dam. (p 651)

That by the construction of the dam the defendant was deprived of riparian rights for which it was entitled to compensation. (p. 653)

What such rights are, was not before the court and was not determined.

On p. 656, the court says that under the act of March 3, 1875, the defendant might claim compensation; that it still has a valid claim which "we think includes any deprivation or interruption of any legal riparian rights."

The scope of the decision of the Supreme Court of the United States is no broader than the decision in the state court. The sole question was whether the legislative act reserved to the state the water power created by the dam, and whether the proceedings thereunder operated to deprive defendant of property without due process of law. The court, in 142 U. S. on p. 272, says:

"That the owner of lot 5 was entitled to compensation for the land appropriated by the state in the construc-

tion of the dam and of the embankment in front of the lot. To what extent he was entitled to the use of the water power created by the dam as against the public and other riparian owners may be difficult of ascertainment, depending, as it does, largely upon the number of proprietors, the width and depth of the river, the volume of the water, the amount of fall and the character of the manufactures to which it was applicable. Nor is it necessary to answer the question in this case, since it appears that, whatever this property is, it has been appropriated and no provision made for the compensation of the owner."

It will be noted, however from the foregoing language that the court did not intend that the riparian owner was to be compensated for any undeveloped water power as is demonstrated by the language of the court on page 273 of the opinion.

"The value of this water power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors who had not the means to make it available. These proprietors lost nothing that was useful to them, except the technical right to have the water flow as it had been accustomed and the possibility of their being able some time to improve it. If the state could condemn this use of the water with the other property of the riparian owner it might raise a revenue from it sufficient to complete the work which might otherwise fail."

"There was every reason why a water power thus created should belong to the public rather than to the riparian owners. Indeed, it seems to have been the practice, not only in New York but in Ohio, in Wisconsin, and perhaps in other States, in authorizing the erection of dams for the purpose of navigation or other public improvement, to reserve the surplus of water thereby created to be leased to private parties under authority of the state."

And again on page 276:

"So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation."

On page 277:

"Inasmuch as the dam abuts upon this lot, its owner was doubtless entitled to compensation for the land occupied by the dam and embankment, as well as for the value of the use of the water diverted from its natural course."

On p. 281 the court says that the water power company claimed to be entitled to one-half of the water created by the improvement "and that too without reference to the riparian rights properly appurtenant to lot 5 *before the improvement was made,* or to any particular fall from the upper to the lower corner of such lot. It is difficult to see how, under these circumstances, this claim can be sustained."

P. 282: That to allow such claim "would savor strongly of an appropriation of public property for private use."

A. C. Conn. Co. v. Little Suamico Lumber Mfg. Co. et al., 74 Wis. 652 (1889), the contest is only between the parties to the action, who are both lumbermen using the stream for the floatage of logs and of whom both are maintaining mills upon the stream.

The question involved was whether the stream was floatable during certain seasons and therefore a public highway. It was admitted that the stream was small and crooked

and not capable of more extended navigation. One of the questions submitted was whether the dams in question were an aid or a hindrance to the floatability of the stream. The court held that a distinction may well be made between floatable streams and streams of a more extended and constant navigation. The court further held that Section 1596 of the statutes applied only to meandered navigable streams and that under Section 1598, Statutes, and Chapter 224, Laws of 1881 (quoted at pp. 53-54 of this brief) a navigable stream which does not fall within the class mentioned in Section 1596, Statutes, may be obstructed without legislative permission, provided only that such obstruction does not impair the free navigation thereof.

In the instructions to the jury which are approved, the court said: "The real test is, was the river made less beneficial and available to the plaintiff in the years stated, for getting down its logs, in consequence of this dam?" p. 662. "Their rights were equal, so far as the floatage was concerned, and their rights to floatage and maintenance of mill dams were to be exercised with due regard to the rights of each other." p. 663.

"Such interruptions in the flow of the water, either by dams, piers, booms, ponds, sluiceways, and chutes for sluicing, as is reasonable and unavoidable by the reasonable and proper use of the mill of the defendants, and consistent with a like reasonable and proper use by the plaintiff and the public, cannot be the subject of an action." (p. 666)

The jury found that the dams did not interfere with the floating of logs. The stream according to maps appears to have a drainage area of less than 50 square miles. The mill dam act was passed in 1840 (Act No. 48, Laws 1840). It refers only to non-navigable streams. Streams were not then generally used for log driving. Hence when in later

years the logging industry made use of streams capable of floating logs during the spring freshet, such streams were declared public highways. The court, however, thereafter took the position (*Allaby v. Mauston Electric Co.,* 135 Wis. 345 (1908), that when the mill dam act was adopted the legislature could not have had in contemplation merely floatable streams and held that the Lemonweir River having a drainage area of 550 square miles is a non-navigable stream under the mill dam act.

Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co. et al., 75 Wis. 385 (1890), is a case which involves merely the rights of the parties to the flow of the stream. It does not deal with the question whether power created by the construction of a dam constitutes a riparian right. The sole question involved was whether the canal company which owns the surplus power by an act of the legislature is "legally bound to return the surplus water to the river substantially at or near the dam and thus enable the plaintiff as such riparian owner to have its share of the use thereof while passing the rapids in a body, or whether the canal company may rightfully convey such surplus in the canal to points at so great a distance below the dam before the same is returned to the river as to deprive the plaintiff of his share of such use while passing the rapids or a portion of them." (p. 391)

Kimberly Clark Co. v. Hewitt et al., 79 Wis. 334 (1891). The controversy relates only to riparian rights between the plaintiff and defendants. The plaintiff owned both sides of the Fox River and erected a dam for the improvement of navigation by authority of the state across the river on its lands and received from the state the surplus water power created by the dam.

The defendant was an upper riparian owner on one side of the stream and claim the ownership of one-half of the surplus power not needed for navigation and threatened to divert one-half of the water of the stream by means of a canal around the plaintiff's lands and discharged the same into the stream below the plaintiff's premises.

Held, that the defendant had no such right "even though it were held that the plaintiff is not the owner of the surplus water power created by the dam. The rule is elementary that, unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to the use of the water, as it is wont to run, without material alteration or diminution; and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners above or below him by throwing it back on the former or subtracting it from the latter. *Lawson v. Mowry*, 52 Wis. 219, and cases cited in the opinion by Mr. Justcie Cassoday." (p. 337)

The court further says that it was held in 70 Wis. 635, after much deliberation, that the canal company is the owner of such surplus water power; that the correctness of that ruling is vigorously challenged but that only one argument urged by them will be noticed. "They maintain that the act of congress of 1875, ch. 166 (considered in the *Kaukauna Case*, and which was repealed in 1888) did not, while in force, supply any adequate means of obtaining compensation for injuries to property caused by the improvement. We think otherwise. We understand that ch. 166 gave a right of action in the state courts against the United States to ascertain the amount of such compensation, and we cannot doubt that it pledges the faith of the government to pay all damages so ascertained. It cannot be presumed that the government will violate its obliga-

tions in that respect. So we are of the opinion that the act of 1875 furnished an adequate mode for obtaining compensation for such injuries." (p. 338)

NOTE: There is no suggestion anywhere in this case, what was included in the property taken from the defendants.

West et al. v. Fox River Paper Co., 82 Wis. 647 (1892). This case involves the relative rights of riparian owners on the Fox River. Both the plaintiff and the defendants own wing dams in the Fox River at the head of Grand Chute Island. The plaintiff, West, owned riparian lands on the south side of the north channel and lands on both banks of the south channel, the island being between the north and south channel. He cut away a portion of the head of the island to put in walls and works to make water available in a canal which was dug through the length of the island.

In 1877 a voluntary association built the Cross dam in the river. The claim of the plaintiff is that he owns three-fifths of the water power created by the dams and the defendant claims that it owns one-half of the power formed by the dams. The only question involved in this case is the respective rights of the parties to the water power thus created.

The defendant's claim that the cutting away of the head of the island greatly enlarged the south channel thereby increasing the flow through the south channel, whereas the plaintiff claimed that the works erected in place of the cutting of the channel did not increase the flow into the south channel.

The Circuit Court on page 653 says: "There are really only two questions on which the judgment depends and they

are whether the defendant's power on the north side has been made available by them at a point opposite and below the head of the island in its natural state; and what proportion of the waters of the river naturally flow in the south channel and the south half of the north channel."

The court sustains the finding of the court below that the defendants' power was made available and their dam on the north side was at a point even with and opposite to a point below the west or upper end of Grand Chute Island, and also sustains the ruling of the court which holds that one-seventh of the natural flow of the river is appurtenant to and flowed through the south channel and six-sevenths was appurtenant to and flowed through the north channel, and therefore apportioned to the plaintiff four-sevenths and to the defendant three-sevenths of the water power.

On page 656 the court finds: "It follows, therefore, that the plaintiff is entitled to the natural flow of the south channel, where his dam is situated for hydraulic purposes, and the whole thereof, by reason of his being the owner of the island on one side, and of the mainland on the other."

The court also finds that he is entitled to one-half of the flow of the north channel.

Water Power Cases, 148 Wis. 124 (1911-1912). In these cases it was distinctly held that if power may be developed within the natural flow of the stream that then it is a riparian right, but any power which may only be made available by means of a dam or other obstruction is not a right which is appurtenant to the upland. The court on page 149 says:

> "The right of the riparian owner to use the water of the river on his own land within his boundary determined by ordinary highwater mark, for the purpose of

creating power or, as the act in question puts it, 'developing energy', returning the water again to the stream, is unquestionably a private right appurtenant to the riparian land. The idea of a legal ownership of the 'energy' of falling water by one who owns neither the water which falls nor the land the declivity of which causes the fall has been analyzed and criticised by counsel for relators. * * * It is conceded there is such a riparian right as the right to use the water for power, and also that this right is to be exercised in subordination to the public right of navigation and the necessary accessories of the latter. We say that if the exercise of this riparian right, in the judgment of the legislature, interferes with the public right of navigation, it may be forbidden. But as has been said by Judge Cooley in *Middleton v. Flat River B. Co.*, 27 Mich. 533: 'Each right should be enjoyed with due regard to the existence and protection of the other.' Or, as he says in *Buchanan v. Grand River & G. L. R. Co.*, 48 Mich. 364, 367, 12 N. W. 490: 'Each right modifies the other and may perhaps render it less valuable, but this fact, if the enjoyment of the right is in itself reasonable and considerate, can furnish no ground for complaint.' *Where the ownership of the bank is essential to the construction of a dam or the creation or development of a water power, the state* is as helpless to use, sell, or lease such right without the condemnation and compensation as the riparian owner is to intrude into the navigable stream without consent of the state. *It requires the concurrence of the riparian owner and the state in such case to make the water power efficient,* and this right of the riparian owner to refuse to concur and stand out for compensation, in the case mentioned, is a private property right and often gives to such land its chief value. The state may refuse its permission to the riparian owner to build a dam and may attach conditions to its consent, such as the height, strength, mode of construction, etc., of the dam, and perhaps other conditions, but it may not seize upon this right without compensation and use it or sell it or lease it to another. It cannot authorize the use and enjoyment

of this right by a person not a riparian owner for a private purpose without the consent of the riparian owner, not for a public purpose without condemnation and compensation to the riparian owner." p. 150.

In connection with the quoted language above, we direct the court's attention to the fact that the Supreme Court of Wisconsin throughout the opinion confined its discussion mainly to a criticism of the effort of the state to take from the owner of a developed dam the right and power to continue to enjoy it, and to appropriate the development to the use of the state or to such other persons as were authorized to appropriate it under the statutes there criticised.

XI.

If the Wisconsin Water Power Act is declared unconstitutional, the Federal Water Power Act will also fall.

The Federal Water Power Act of 1920 provides that the United States may at the end of fifty years recapture any water power developed under its license by paying therefor, generally speaking, the investment cost. It is obvious that this cost may not represent the value of the development at the time of taking fifty years thereafter.

Under the Wisconsin Act the state or a municipality may recapture under somewhat similar provisions. It is obvious that if the Wisconsin Act is held to be unconstitutional, the Federal Water Power Act must also be unconstitutional, because like the Wisconsin Act, it does not provide compensation for the increased value of the water power capacity of the stream.

XII.

CONCLUSION

As nearly as we can ascertain from the brief of plaintiff in error the position of the plaintiff in error is solely that the water capacity of a stream is a property right appurtenant to the upland and that the state does not allow compensation for any increase in the value of the undeveloped power of a stream at the time of issuing the permit and its value at the time of taking. They do not object to the state's method of determining the value of the other property taken, namely, dams, works, buildings and other structures or equipment used and useful under the permit at the time of taking.

There are two answers to this conclusion (1) that the public rights in public waters are not limited to the improvement of the stream for navigation but include all public rights, such as the taking of fish, ice, the development of a municipal water supply and the public right to develop power and that all riparian rights are subordinate to all public rights; and (2) that the water power capacity of the stream is not a riparian right and the riparian owner having no "vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, and that the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland." *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 76.

The state in surrendering to the riparian owner a valuable right for the period specified in the statutes may fix as a condition the right to recapture the entire development upon terms fixed at the time of issuing the permit,

which in the instant case is payment for the entire development at the time of taking over, but without paying for that part of the development which never belonged to the riparian owner.

IT IS THEREFORE RESPECTFULLY SUBMITTED, That these proceedings should be accordingly dismissed.

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APPENDIX

HISTORY OF STATE LEGISLATION

I

1840 Territorial Laws, 1840, Act No. 9:

"Section 1. That all rivers and streams of water in this territory in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States Government are hereby declared navigable to such an extent that no dam, bridge or other obstruction may be made in or over the same without the permission of the legislature."

1849 Reenacted without change as *Ch.* 34, *R. S.* 1849.

1853 Renumbered to be *Sec.* 2, *Ch.* 34, and following proviso added:

"Provided, that nothing herein contained shall be construed so as to affect any act now in force granting to towns, or county boards or supervisors the power to erect, or authorize the construction of bridges across such streams."

1858 Renumbered to be *Sec.* 2 of *Ch.* 41, *R. S.* 1858, substantially without change.

1878 Renumbered to be *Sec.* 1596, *Stats.* 1878, with only verbal changes.

1911 Amended to read and provide as follows:

"Subsection (1). All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the Government of the United States and all rivers and streams meandered or nonmeandered which are navigable in fact for any purpose whatsoever are hereby declared navigable to the extent

that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the legislature." . . .

"Subsection (2). Any dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of the provisions of this section is hereby declared to be a public nuisance and the construction of any such dam, bridge or other obstruction may be enjoined or its maintenance abated by an action at the suit of the state of any citizen."

Subsection (3) provides a forfeiture for violations.

Subsection (4) makes it the duty of the Railroad Commission to report violations to the Governor of the state. (Ch. 652, Laws of 1911)

1917 *Subsection* (1) *supra,* renumbered to be *Sec.* 30.01, *Stats.* 1917, and amended by adding "every dam not furnished with a slide, chute or other equipment prescribed by the (railroad) commission" to the classes of obstruction prohibited.

Subsection (3) *supra,* (consolidated with *Sec.* 1596—22, Subs. (1) and *Sec.* 1598, *Stats.* 1915), renumbered to be *Sec.* 31.23, and revised to read:

"(1) Every person or corporation that shall obstruct any navigable waters and thereby impair the free navigation thereof, or shall place therein or in any tributary thereof any substance whatever that may float into and obstruct any such waters or impede their free navigation, or shall construct or maintain, or aid in the construction or maintenance therein of any bridge, boom or dam not authorized by law, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such bridge, boom, dam or other obstruction, a sum not exceeding fifty dollars. But the floating or movement of logs or timber in navigable waters, or the necessary use of temporary booms in the course of such

floating or movement shall not incur such forfeiture."

"(2) Every person or corporation violating any of the provisions of this chapter, other than those mentioned in subsection (1) of this section, or violating any order made by the commission pursuant to any provision of this chapter, shall forfeit for each such violation not more than one thousand dollars."

Subsection (4) consolidated with *Sec.* 1596—22, Subs. (2), renumbered to be *Sec.* 3124, *Stats.* 1917, and revised to read:

"(1) It shall be the duty of the commission to report to the governor every forfeiture incurred under subsection (1) of section 31.23 and every nuisance committed in violation of section 31.25 and the governor shall thereupon cause the attorney-general, or some other person duly authorized by the governor to act instead of the attorney-general, to institute proceedings to recover such forfeiture or abate such nuisance.

"(2) It shall be the duty of the attorney-general, when so requested by the governor, and otherwise the duty of the district attorney of the proper county, to institute proceedings to recover any forfeiture incurred under this chapter other than those specified in subsection (1) of section 31.23.

"(3) All such forfeitures shall be recovered by civil action as provided by chapter 142 of the statutes and when collected shall be paid directly into the state treasury."

Today These statutes now bear the same section numbers as last above given, being *Sections* 30.01, 31.25, 31.23, and 31.24 respectively, *Stats.* 1925, and contain no subsequent changes.

II.

1853 *Sec.* 1, *Ch.* 34, *Rev. Stats.*

"Section 1. The river Mississippi, and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the state, as to the citizens of the United States, without any tax, impost or duty therefor: Provided, that nothing herein contained shall prevent the collection of all tolls imposed for necessary easements, constructed in the said navigable waters."

1858 Renumbered to be *Sec.* 1, *Ch.* 41, *R. S.* 1858; substantially no change.

1878 Omitted from statutes by revisor "as being sufficiently sanctioned by its enactment in the constitution."

III.

1853 *Sec.* 3, *Ch.* 34, *Rev. Stats.*

"Section 3. The boundaries of lands adjoining waters, and the several and respective rights of individuals, the state, and its citizens, in respect to all such lands and waters, shall be determined in conformity to the common law, so far as applicable as evidenced by judicial determinations in other states, in which the courts in such cases have adhered to its principles: Provided, That the provisions of this section shall have no effect in the determination of causes now pending in any of the courts of this state."

1858 Renumbered to be *Sec.* 3, *Ch.* 41, *R. S.* 1858.

1878 Renumbered to be *Sec.* 1597 and amended to read:

"The boundaries of lands adjoining waters and the rights of the state and of individuals in respect to

such lands and waters shall be determined in conformity to the common law as far as applicable."

1917 Renumbered to be *Sec.* 30.10.

1919 Renumbered to be *Sec.* 30.01, *Subs.* (4), *Par.* (*d*).

Today In effect unchanged, as *Sec.* 30.01, *Subs.* (4), *Par.* (d).

IV.

1858 *Sec.* 112, *Ch.* 41, *R. S.* 1858.

"Section 112. Whoever shall obstruct the navigation of any river or stream, which now is, or hereafter may be made, navigable, by falling any tree therein, or putting into any river or stream, declared a public highway, any refuse lumber, slabs, or other waste materials, on conviction thereof, shall forfeit the sum of five dollars for any such offense; and shall be further liable for all damages that may accrue on account of such obstruction."

1878 Renumbered to be *Sec.* 1598, and amended to read:

"Every person who shall obstruct any navigable stream in any manner so as to impair the free navigation thereof, or place in such stream or any tributary thereof any substance whatever, so that the same may float in or into, and obstruct any such stream or impede its free navigation, or construct or maintain, or aid in the construction or maintenance of, any boom not authorized by law, in any such navigable stream, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such boom, twenty-five dollars; one-half to be paid to the person prosecuting. Every person damaged by such offense may sue for and collect such penalty, and in the same action may sue for and collect any special damage, sustained by him thereby, with costs. The verdict or finding, when for the plaintiff, shall state separately the amount of his special damages."

1917 Consolidated with *Sec.* 1596, *Subs.* (3) and *Sec.* 1596—22, *Subs.* (1) and revised as shown *supra.*

V.

1881 *Ch.* 220, *Laws of* 1881.

"Any person who shall materially obstruct the navigation of any river or stream in this state, used for the purpose of driving and floating saw-logs thereon, by banking or 'browing' logs therein, in such manner as to unnecessarily endanger or delay the passage of logs owned by other parties higher up on such stream, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than two hundred dollars, and in addition thereto, shall be liable for all damages sustained by other persons by reason of such obstruction and delay in driving and floating logs from points higher up on such stream."

1898 Repealed by *Ch.* 205, *R. S.* 1898.

VI.

THE MILL DAM ACT.

1840 The Mill Dam Act was enacted in 1840 as Act No. 48 by the Territorial Assembly for the purpose of authorizing the construction of mill dams in *non-navigable* streams. It exists today as *Sections* 31.31, 31.32 and 31.33, *Statutes* 1925.

CHAPTER 31, WISCONSIN STATUTES, 1925

WATER POWERS, MILLS AND MILLDAMS

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31.33 Under jurisdiction of railroad commission.

31.01 *Definitions.* Terms used in this chapter are defined as follows:

(1) "Commission" means the railroad commission of Wisconsin.

(2) "Navigable waters" means all waters declared navigable by chapter 30 of these statutes.

(3) "Permit" means legislative permission granted under section 31.06 to construct, operate and maintain a dam in or across navigable waters, or under section 31.08 to continue the operation and maintenance of any dam so situated which was constructed before such legislative permits were required.

(4) "Grantee" means the person, firm, corporation or municipality to whom a permit is granted, and all subsequent owners of the grant.

(5) "Corporation" means a private corporation organized under the laws of this state.

(6) "Municipality" means any town, village, city, or county in the state. [*Stats.* 1915 *s.* 1596—1; 1917 *c.* 474 *s.* 2]

31.02 *Powers of the railroad commission.* (1) The commission in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

(2) The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of this chapter of the statutes.

(3) The commission or any member or any agent or employe thereof shall at all times be accorded free access to any and all parts of any dam and appurtenances constructed or maintained in navigable waters.

(4) The commission may order and require any dam hereto-

fore or hereafter constructed to be equipped and operated, in whole or part, as follows:

(a) With slides and chutes for the passage of logs and timber products.

(b) With a lock, boat hoist, marine railway or other device of a size and construction sufficient to accommodate navigation.

(c) With good and sufficient fishway or fishways.

(d) With spillways or flood gates capable of permitting the passage through or over the same of freshets and floods during all seasons of the year.

(e) With booms, piers or other protection works ample to safeguard flood gates from trash or other floating material.

(5) The commission, whenever consistent with public rights, is authorized and empowered to make contracts for the removal of any material from the bed of any navigable lake, to fix and determine the compensation to be paid to the state of Wisconsin for material so removed, and to enter into contracts, on behalf of the state of Wisconsin, for the lease or sale of such material, with such conditions as may be necessary for the protection of the public interests and the interests of the state of Wisconsin, provided that no such contract shall be made to continue for a longer period than five years. [*Stats.* 1915 *s.* 1596—*2*; 1917 *c.* 474 *s.* 3; 1923 *c.* 410] Annotated †

31.03 *Public utilities law applicable.* In exercising its powers and performing its duties under this chapter the commission shall be guided and controlled also by the powers with which it is invested by sections 196.01 to 197.10, so far as such sections are applicable. [*Stats.* 1915 *s.* 1596—3; 1917 *c.* 474 *s.* 4]

31.04 *Permits to develop power.* Permits to construct, operate and maintain dams may be granted to persons, corporations or municipalities under the provisions of this chapter. [*Stats.* 1915 *s.* 1596—4, 1596—5; 1917 *c.* 474 *s.* 5; 1925 *c.* 222]

NOTE: This section is a revision of what formerly were Sections 1596—4 and 1596—5 created by Ch. 380, Laws 1915, which read as follows:

Section 1596—4. Permits may be granted, under the provisions of sections 1596—1 to 1596—26, inclusive, of the statutes, for any lawful private purpose, or for the purpose of developing hydraulic power and generating hydroelectric energy for sale or service to the public.

Section 1596—5. Any municipality, in order to create power to be used for lighting, heating, pumping and other purposes, may apply for and obtain a permit under the provisions of sections 1596—1 to 1596—26, inclusive, of the statutes, to construct and maintain or to maintain a dam within or without the corporate limits or boundaries thereof in this state; and in the acquisition of a permit and in the exercise and enjoyment of rights thereunder and for the purpose for which the permit was granted, shall have and may enjoy all the powers conferred upon municipalities by the statutes.]

31.05 *Applications for permits to construct.* Any person, firm, corporation or municipality desiring a permit to construct, operate, and maintain a dam shall file with the commission a written application therefor, setting forth:

(1) The name of the navigable waters in or across which a dam is proposed to be constructed and a specific description of the site for the proposed dam.

(2) The purpose or purposes for which the proposed dam is to be constructed, operated and maintained.

(3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose or purposes, evidence that the described dam site is owned by the applicant.

(4) A general description of the proposed dam, of the material to be used in the construction thereof, and a general description of all booms, piers, and other protection works to be constructed in connection therewith.

(5) The approximate amount of hydraulic power that the proposed dam is capable of developing.

(6) The location of the nearest city or village and of the nearest existing dam above and below the site of the proposed dam.

(7) A map on the scale of not less than four inches to the mile showing the lands that may be affected by the construction, operation or maintenance of the proposed dam, or by any flowage that may be caused thereby and approximately the outline of such flowage, which map shall indicate the ownership of each tract of land within the flowage.

(8) Such additional information of any nature that may be required by the commission. [*Stats.* 1915 *s.* 1596—6; 1917 *c.* 474 *s.* 6; 1925 *c.* 222] Annotated†

31.06 *Hearing.* (1) Upon receipt of an application for a permit the commission shall fix a time not more than eight weeks thereafter, and a convenient place, for a public hearing thereon; it shall also give notice of such time and place to the applicant who shall cause the same to be published once each week for three successive weeks before such hearing in at least one newspaper, designated by the commission, in each county in which riparian lands will be affected by the proposed dam.

(2) In addition to such publication the applicant, not less than twenty days prior to such hearing, shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and postpaid envelope properly addressed. Proof of such publication and notice shall be filed with the commission.

(3) At such hearing or any adjournment thereof the commission shall consider the application, and shall take evidence offered by the applicant and other persons in support thereof or in opposition thereto, may require the amendment of the application, and if it shall appear that the construction, operation or maintenance of the proposed dam will not materially obstruct existing naviga-

tion or violate other public rights and will not endanger life, health or property, the commission shall so find and a permit is hereby granted to the applicant. [*Stats.* 1915 *s.* 1596—7; 1917 *c.* 474 *s.* 7]

31.07 *Applications for permits to operate and maintain existing dams.* Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the tenth day of July, 1915, shall file with the commission a written application therefor setting forth:

(1) The name of the navigable waters in or across which such dam was constructed and a specific description of the dam site.

(2) The year in which the construction of the dam was completed, and a detailed description of the dam and equipment, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the dam is constructed.

(3) The purpose for which the dam was theretofore operated and is operated at the time application hereunder is made, and the purpose for which it is proposed to operate and maintain the dam.

(4) The approximate amount of hydraulic power developed thereby.

(5) The location of the nearest city or village and of the nearest existing dam above and below the dam site.

(6) Such additional information of any nature whatsoever as may be required by the commission. [*Stats.* 1915 *s.* 1596—8; 1917 *c.* 474 *s.* 8] Annotated †

31.08 *Hearing.* Upon receipt of an application under section 31.07 procedure shall be had substantially as required by section 31.06, and if the commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant. [*Stats.* 1915 *s.* 1596—9; 1917 *c.* 474 *s.* 9]

31.09 *Proposals to accompany applications.* Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all

right to any further compensation. [*Stats.* 1915 *s.* 1596—9*m*; 1917 *c.* 474 *s.* 10; 1925 *c.* 222]

31.10 *Permit not to be valued.* Each and every permit is granted, and shall be conclusively deemed to be accepted, subject to the condition that no element of value whatever shall ever attach to or be allowed for such permit in and of itself in the sale or acquisition of the property used and useful under such permit or otherwise. [*Stats.* 1915 *s.* 1596—10; 1917 *c.* 474 *s.* 11]

31.11 *Certificate of terms and forfeiture of permits.* The commission shall issue to every grantee of a permit a certificate evidencing a grant of the permit allowed by law. Every permit, and every franchise heretofore granted by the legislature, to construct, maintain and operate a dam shall become null and void, unless the dam thereby authorized be completed within five years from the time when the permit or the franchise was granted; but the commission, for good cause, may extend such time for a period not exceeding two years. [*Stats.* 1915 *s.* 1775*c*; 1917 *c.* 474 *s.* 11]

31.12 *Map, profile and plans.* (1) The grantee of a permit under section 31.06, to construct, maintain and operate a dam, before commencing any work of construction authorized by the permit, shall submit to the commission a complete map and profile on the scale of not less than one inch per thousand feet showing the land that may be affected by the construction and maintenance of the dam, or by any flowage that may be caused thereby, and the outline of the flowage, and such other hydrographic and topographic data as the commission may prescribe, and shall also file complete detailed plans and specifications for the proposed dam, including all booms, piers, or other protection works.

(2) The commission shall examine the map, profile, plans and specifications; shall hear the grantee thereon and may reject the same or any part thereof, if unsatisfactory or incomplete, or may suggest and require modifications thereof. If the map, profile and plans and specifications are satisfactory and complete, or, if the same shall be modified as suggested and required, the commission shall

so find and approve the same, and thereupon the grantee shall have authority to construct the proposed dam in accordance therewith, but the commission may, at any time during the construction of any dam and in the interest of the public safety, or of any public rights in navigable waters, authorize, order or require such changes in the plans and specifications and the construction of the dam as shall be necessary.

(3) If the commission, in the case of an application for a permit to construct a dam with a capacity of less than two hundred fifty hydraulic horse power at ordinary stage of water, shall find that the information and data furnished in the original or amended application is sufficient, the applicant shall not be required to furnish the additional or more detailed information or data specified in subsections (1) and (2) of this section. The commission may, however, at any time during the construction of any such dam authorize, order or require changes in the construction or the method or plan of construction thereof, as provided in subsection (2) of this section.

(4) Within ten days after the completion of any dam the grantee shall file with the commission a verified statement that the same was constructed in accordance with the plans and specifications approved by the commission; or in case no plans and specifications were required to be filed, then that the dam was constructed in accordance with the description contained in the application. [*Stats.* 1915 *s.* 1596—11; 1917 *c.* 474 *s.* 12]

31.13 *Raising or enlarging existing dams.* (1) If the owner of any existing dam wishes to raise or enlarge the same, he may apply to the commission for permission so to do, but the permission granted under this section shall be in amendment of any existing franchise, license, or permit previously granted authorizing the construction or maintenance of such dam only to the extent of giving the right so to raise or enlarge such dam, and shall in no way enlarge, alter, abridge or nullify property rights, privileges or obligations as to such dam, or the maintenance or operation thereof theretofore acquired or incurred. In addition to the requirements of

subdivisions (1), (6) and (7) of section 31.05, his application shall state:

(a) The year in which his dam was completed.

(b) If constructed by legislative permission, a statement of the act of the legislature authorizing the same.

(c) A detailed description of the dam, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the same is constructed.

(d) The purpose for which such dam has been and is now used and the purpose for which it is proposed to use the same.

(e) The approximate amount of hydraulic power developed thereby.

(f) Such additional information of any nature whatsoever as the commission may require.

(2) Upon receipt of an application under this section procedure shall be had substantially as required by section 31.06; and if the commission shall find that the dam, raised or enlarged or rebuilt, or rebuilt, enlarged and raised in accordance with the application, will not materially obstruct existing navigation or violate other public rights, and will not endanger life, health or property, permission is hereby granted to raise or enlarge or rebuild, or rebuild, enlarge and raise the same in accordance with the application. [*Stats.* 1915 *s.* 1596—12; 1917 *c.* 474 *s.* 13]

31.14 [*Repealed by* 1919 *c.* 571 *s.* 3]

31.15 *Acquisition of existing dams.* (1) Every domestic corportation lawfully engaged in the business of producing, transmitting, delivering or furnishing heat, light, water, power, or street or interurban electric railway service to or for the public may, for the purpose of developing power and generating energy for public use in and about such business, acquire any dam in or across any navigable waters of this state and all flowage and other rights and property necessary to the maintenance thereof, or any undeveloped water power or dam site upon any such waters within this state, except as provided otherwise in subsection (2).

(2) No award in any condemnation proceedings authorized by subsection (1) shall be effective, and no corporation shall purchase or otherwise acquire any such property until it shall have obtained from the commission a certificate that public convenience and necessity require the acquisition of the same, at the amount fixed by such award or agreed upon with the owner thereof. [*Stats.* 1915 *s.* 1596—14; 1917 *c.* 474 *s.* 15; 1919 *c.* 571 *s.* 2] Annotated †

31.16 *Certificate of convenience and necessity; notice of hearing.* (1) Any such corporation desiring to purchase or acquire any property pursuant to section 31.15 shall apply to the commission for a certificate of public convenience and necessity. Such application shall state the name of the owner or owners of the property sought to be acquired; the business in connection with which it is desired to utilize said property; the specific public purpose or purposes for which it is proposed to use the same; the compensation or price to be paid therefor, and such other information as the commission may require; and shall contain a statement to the effect that the said corporation agrees to cancel all contracts for the sale of hydroelectric power outside this state, which shall at any time be found by the commission to interfere with adequate service and reasonable rates to the people of this state.

(2) Upon receipt of such application the commission shall fix a convenient time and place for a public hearing thereon, which time shall not be more than eight weeks from the date of filing such application. Notice of the time and place so fixed shall be given to the applicant, who shall cause the same to be published at least once each week for three successive weeks preceding such hearing in a newspaper designated by the commission, and the applicant shall also, not less than twenty days prior to said date, serve notice thereof upon the owners of such property personally, or by registered mail, if the post-office address of such owners, can by due diligence be ascertained. Proof of such publication and service of such notice shall be filed with the commission. [*Stats.* 1915 *s.* 1596—15; 1917 *c.* 474 *s.* 16]

31.17 *Hearing and determination.* (1) At such hearing or any adjournment thereof, the commission shall consider such application and shall receive the evidence offered by the applicant and others, in person or by agent, in support thereof and in opposition thereto.

(2) If the commission shall find that the acquisition and use of such property in connection with the business of the applicant for the purpose or purposes and at the price or compensation set forth in the application would be a public convenience; that the applicant possesses the financial ability to utilize the property for such purpose or purposes, and that a public necessity requires such acquisition and use, the commission shall grant and issue a certificate that public convenience and necessity require the utilization of such property as proposed by the applicant.

(3) The provisions of section 31.15 shall not apply to the acquisition of flowage rights necessary for the improvement or development of dams or dam sites previously acquired. [*Stats.* 1915 *s.* 1596—16; 1917 *c.* 474 *s.* 17]

31.18 *Obligations of owners of bridges and dams.* (1) The grantee of any permit, the owner of any dam constructed before permits were required by law, and the owner of any bridge at the city of Portage or at any point above that city, over the Wisconsin river, shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the commission for the protection of public rights in such waters, and for the preservation of life, health and property, in good repair and condition, and shall not wilfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the commission shall have approved such removal or destruction in writing.

(2) The owner of any such dam shall open such slide or chute for the passage of any craft or material lawfully navigating the stream, whenever requested so to do by the person in charge of such navigation, without charge or toll therefor. But such owner

shall be under no obligation to otherwise aid passage through the slide or chute.

(3) Except when emergency shall require the same for the protection of life, health or property, no substantial alteration or addition shall be made to any dam heretofore or hereafter constructed without obtaining an order therefor from the commission, which order may be issued only after an investigation and upon a finding that the proposed alterations or additions will not impair the sufficiency of such dam or any existing public rights in such waters.

(4) The railroad commission may in the interest of public rights in navigable waters, or to promote safety and protect life, health and property, require the grantee of any permit, under this chapter, or of any permit or authorization heretofore provided for by legislative enactment, prior to flowing any lands by the construction of a dam thereunder, to remove from such lands all or any portion of the standing and fallen timber and all or any portion of the brush. [*Stats.* 1915 *s.* 1596—17, 1601, 1602, 1605; 1917 *c.* 339; 1917 *c.* 474 *s.* 18, 18a; 1925 *c.* 337] Annotated *

31.19 *Complaint of insufficiency of dam; inspection.* The railroad commission shall examine at least once in each year each dam having a theoretical horse power capacity of seven hundred fifty horse power or more and which is maintained or operated in or across navigable waters, and in addition thereto and upon complaint in writing from the mayor of any city, supervisor of any town, or the president or trustee of any village, that any dam maintained or operated in or across any waters whether navigable or nonnavigable, or any reservoir is in an unsafe condition, or from any person that his property or any property under his control is endangered by a dam or reservoir, the commission shall investigate or cause an investigation to be made of such complaint, or the commission may, upon its own motion, examine any dam or reservoir, and, in any case, if it shall find that any dam or reservoir is not sufficiently strong, or is unsafe, and dangerous to life or property, it shall determine what alterations, additions or repairs are neces-

sary to be made and shall order the owner, or person having control of such dam or reservoir to cause such alterations or repairs to be made within a time to be limited by the order; and the commission may cause to be drawn off, in whole or in part, the water in said reservoir or impounded by said dam, when it shall determine that such action is necessary to prevent impending danger to persons or property. [*Stats.* 1915 *s.* 1596—18; 1917 *c.* 109; 1917 *c.* 474 *s.* 19; 1917 *c.* 538 *s.* 1]

31.20 *Inspection fee.* Every owner, excepting municipalities, of a dam heretofore or hereafter constructed in or across navigable waters shall pay to the commission annually, on or before the first day of February, for the purpose of defraying the actual expense of the commission incurred in inspecting and supervising the construction or maintenance, or both, of such dam and equipment, an inspection fee of not to exceed ten cents per theoretical horse power capacity of such dam at an ordinary stage of water, said fee however, not to be less than twenty-five dollars in any case, if such actual expenses of the commission shall equal that amount. The amount of such fee shall be determined annually by the commission, and notice of the amount due shall be forwarded by mail to each such owner, or the agent thereof, not later than December first of each year. Inspection fees received by the commission shall be paid into the state treasury. [*Stats.* 1915 *s.* 1596—19; 1917 *c.* 474 *s.* 20; 1917 *c.* 538 *s.* 2] Annotated †

31.21 *Transfer of permit.* (1) No transfer or assignment of any permit granted under section 31.06 or section 31.08 shall be valid or of any effect whatsoever unless the same shall be in writing and a certified copy thereof shall, within ten days after the execution thereof, be filed with the commission and unless such transfer or assignment is approved in writing by the commission; and no such transfer or assignment shall be approved by the commission except after an investigation and a finding that the transfer or assignment is not made or intended to be made for a purpose or to create a condition prohibited by section 31.22. No permit shall be transferred or assigned to a foreign corporation, nor shall any permit

granted to a municipality be assigned or transferred to any person, firm, or corporation, otherwise than as security for a loan made in good faith and concurrently with and as consideration for such transfer or assignment, and no foreign corporation shall have power to acquire title to any such permit, nor shall any person, firm or corporation have power to acquire title to a permit granted to or acquired by a municipality, otherwise than in the enforcement of such security, and in no case shall any such foreign corporation hold title to or operate under any such permit for a period longer than three years.

(2) No municipality shall make or execute any lease or other contract with any person, firm, or corporation for the sale or use of hydraulic or hydroelectric power developed or generated by such municipality under a permit granted under section 31.06 or section 31.08 for a period longer than ten years, unless the same shall be first approved by the commission, after investigation and upon a finding that such lease or contract will not impair or interfere with the purpose or uses for which such dam was acquired or constructed by the municipality. [*Stats.* 1915 *s.* 1596—20; 1917 *c.* 474 *s.* 21]

31.22 *Unlawful combinations, trusts.* If any dam maintained under a permit,

(1) Shall be owned, leased, trusteed, possessed or controlled in any manner whatsoever that makes it form a part of or in any way effect an unlawful combination;

(2) Or shall be in any wise controlled by any combination in the form of an unlawful trust;

(3) Or forms the subject of any contract or conspiracy to limit the output of any hydraulic or hydroelectric power derived therefrom, or to restrain unlawfully trade in the generation, sale or distribution of hydraulic or hydroelectric power derived therefrom.

The state may take possession thereof by proceedings instituted by the commission, as in cases of receivership, and in such proceedings the members of the commission shall be appointed to act as receivers during such period as the court may determine. [*Stats.* 1915 *s.* 1596—21; 1917 *c.* 474 *s.* 22]

31.23 *Forfeitures.* (1) Every person or corporation that shall obstruct any navigable waters and thereby impair the free navigation thereof, or shall place therein or in any tributary thereof any substance whatever that may float into and obstruct any such waters or impede their free navigation, or shall construct or maintain, or aid in the construction or maintenance therein of any bridge, boom or dam not authorized by law, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such bridge, boom, dam or other obstruction, a sum not exceeding fifty dollars. But the floating or movement of logs or timber in navigable waters, or the necessary use of temporary booms in the course of such floating or movement shall not incur such forfeiture.

(2) Every person or corporation violating any of the provisions of this chapter, other than those mentioned in subsection (1) of this section, or violating any order made by the commission pursuant to any provision of this chapter, shall forfeit for each such violation not more than one thousand dollars. [*Stats.* 1915 *s.* 1596 *sub.* 3, 1596—22 *sub.* 1, 1598; 1917*c.* 474 *s.* 23] Annotated * †

31.24 *Enforcement of forfeitures.* (1) It shall be the duty of the commission to report to the governor every forfeiture incurred under subsection (1) of section 31.23 and every nuisance committed in violation of section 31.25 and the governor shall thereupon cause the attorney-general, or some other person duly authorized by the governor to act instead of the attorney-general, to institute proceedings to recover such forfeiture or abate such nuisance.

(2) It shall be the duty of the attorney-general, when so requested by the governor, and otherwise the duty of the district attorney of the proper county, to institute proceedings to recover any forfeiture incurred under this chapter other than those specified in subsection (1) of section 31.23.

(3) All such forfeiture shall be recovered by civil action as provided by chapter 288 of the statutes and when collected shall be paid directly into the state treasury. [*Stats.* 1915 *s.* 1596 *sub.* 4, 1596—22 *sub.* 2; 1917 *c.* 474 *s.* 24] Annotated *

31.25 *Nuisances, abatement.* Every dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of the provisions of this chapter, and every dam not furnished with a slide, chute or other equipment prescribed by the commission, is hereby declared to be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or any citizen thereof. [*Stats.* 1915 *s.* 1596 *sub. 2*, 1603; 1917 *c.* 474 *s.* 25] Annotated * †

31.26 *Civil liabilities.* (1) The owner of any dam or of any privately owned bridge across the Wisconsin river or the Black river or any of their tributaries shall be liable for all damages occasioned to property by a failure to provide such dam or bridge with slides, booms and chutes as required by subsection (1) of section 31.18. The person or party suffering any such damage shall have a lien upon the dam and all mills, machinery and appurtenances of such owner erected thereon, or served with water thereby, and on the lands adjoining, not exceeding forty acres; or, as the case may be, a lien upon such bridge and its approaches.

(2) The claimant of such lien shall file a notice thereof in writing in the office of the clerk of the circuit court of the county in which the dam or bridge is located within sixty days after sustaining such damages and shall commence an action to enforce the lien within six months after filing such notice. Such lien shall accrue upon the filing of such notice and failure to file the same or to commence such action within the times specified therefor respectively shall operate as a waiver of the lien. Judgment for the plaintiff for the recovery of damages and declaring such lien may be enforced by an execution sale of the property affected as in ordinary actions at law, and upon such sale all rights to maintain such dam or bridge shall pass to the purchaser.

(3) In case of any personal injury by reason of any such neglect or failure the damages sustained thereby may be recovered and a lien and judgment enforced in like manner; and if death results an

action may be maintained by the representatives of the deceased in the manner provided in other cases of death resulting from negligence or wrong.

(4) No common law liability, and no statutory liability provided elsewhere in these statutes, for damage resulting from or growing out of the construction, maintenance or operation of any dam is released, superseded, or in any manner affected by the provisions of this chapter; and this chapter creates no liability on the part of the state for any such damages. [*Stats.* 1915 *s.* 1596—23, 1604, 1606; 1917 *c.* 474 *s.* 36]

31.27 *Adequate service; reasonable rates.* Upon complaint by any party affected, setting forth that any grantee of a permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state. [*Stats.* 1915 *s.* 1596—24; 1917 *c.* 474 *s.* 27]

31.28 *Court review of commission orders.* The state or any party to a proceeding authorized by this chapter to be had before the commission may have a review in the circuit court for Dane county of any order, finding or determination made therein by the commission, and all of the provisions of sections 196.01 to 197.10, inclusive, so far as applicable, shall apply to the review herein provided for, including the right of appeal to the supreme court. Upon such review and appeal, the findings and determination of the commission shall constitute prima facie evidence of the facts therein found. [*Stats.* 1915 *s.* 1596—25; 1917 *c.* 474 *s.* 28]

31.29 *May employ hydraulic engineer and assistants.* The commission is authorized to employ and fix the salaries of a competent

hydraulic engineer and other assistants necessary to carry out the provisions of this chapter. [*Stats.* 1915 *s.* 1596—27; 1917 *c.* 474 *s.* 32]

31.30 *Dams on Brule river prohibited.* It is declared to be the policy of the state to prohibit forever the building or maintaining of any dam or dams across the Brule river or any of its tributaries in Douglas county; and all rights, privileges and franchises granted prior to June 26, 1905, to any person or corporation to improve said Brule river or any of its tributaries in Douglas county; and all rights, privileges and franchises annulled. No domestic corporation organized subsequent to the date aforesaid shall exercise any of the powers or privileges authorized or conferred by sections 180.15 to 180.18, inclusive, in, across or along said river or any of its tributaries in the county of Douglas. [*Stats.* 1915 *s.* 1596*m;* 1917 *c.* 474 *s.* 33]

31.31 *Dams on nonnavigable streams.* Any person may erect and maintain upon his own land, and, with the consent of the owner, upon the land of another, a water mill and a dam to raise water for working it upon and across any stream that is not navigable in fact for any purpose whatsoever upon the terms and conditions and subject to the regulations hereinafter expressed; and every municapality may exercise the same rights upon and across such streams that they may exercise upon or across streams navigable for any purpose whatsoever. [*Stats.* 1915 *s.* 3374, 3374*a;* 1917 *c.* 474 *s.* 34] Annotated * †

31.32 *Dams not to injure other dams or sites.* No such dam shall be erected to the injury of any mill lawfully existing, either above or below it on the same stream; nor to the injury of any mill site on the same stream on which a mill or milldam shall have been lawfully erected and used or is in the process of erection, unless the right to maintain a mill on such last-mentioned site shall have been lost or defeated by abandonment or otherwise; nor to the injury of any such mill site which has been occupied as such by the owner thereof, if such owner, within a reasonable time after commencing

such occupation, completes and puts in operation a mill for the working of which the water of such stream shall be applied. [*Stats.* 1915 *s.* 3375; 1917 *c.* 474 *s.* 35] Annotated * †

31.33 *Under jurisdiction of railroad commission.* (1) ALL HERETOFORE OR HEREAFTER CONSTRUCTED—ACTION FOR DAMAGES. All mills and milldams lawfully erected or constructed, on streams not navigable at the time, under and pursuant to the provisions of chapter No. 48 of the territorial laws of 1840, chapter 62, laws of 1857, chapter 56, R. S. 1858, chapter 146, R. S. 1878, chapter 146, R. S. 1898, chapter 146, Wisconsin Statutes of 1911, 1913 or 1915 or under and pursuant to any special, private or local act, or under any other act whatsoever, which are not now abandoned but are still in existence and use, and all mills, and milldams heretofore or hereafter erectedor constructed on streams not navigable in fact for any purpose whatsoever, shall be subject to and regulated and controlled by the provisions, so far as applicable, of sections 31.02, 31.03, 31.12, 31.18, 31.19, 31.20, 31.22, 31.25, 31.26 and 31.28 of the statutes, except that the provisions of said sections shall not prevent the owner of any land flooded or otherwise injured by any such milldam from recovering, by action at law, full compensation for all damages resulting to him in times past and that will result to him in the future in consequence of such flooding and injury; provided that no damages suffered more than three years before the commencement of such action shall be recovered. The amount recovered shall constitute a first lien upon the milldam and upon the mill, if any, and such lien may be enforced by execution sale of the property affected. In every such action the amount paid or secured to be paid under prior laws as damages shall be considered and proper allowance made therefor. The authority hereby granted to bring such action shall not be construed as precluding the owner from proceeding under the provisions of chapter 32. Such owner may not exercise his option to bring such action after condemnation proceedings have been commenced against his property under the provisions of said chapter 32.

(2) LICENSE. A license is hereby granted to each owner of any such milldam now in existence and use, and to each owner of any such milldam hereafter constructed, to maintain and use the same to operate mills or machinery, or for any other lawful private or public purpose, but subject, however, to the supervision of the commission acting under the sections of the statutes enumerated in subsection (1). The right created by such license shall follow the title to the milldam and a conveyance of the latter shall transfer such right to the grantee.

(3) INTERPRETATION. Whenever the sections of the statutes so enumerated are applied to mills or milldams specified in subsection (1) every reference in any of them to a "permit" or to a "grantee" of a permit shall be regarded as referring respectively to a license granted by this section and to the owner of such a mill or milldam.

(4) HEIGHT. The height to which water may be raised by any such milldam and the length or period of time for which it may be kept up each year, may be restricted and regulated by the orders of the commission.

(5) VIOLATION OF ORDERS, PENALITIES. Every person, firm or corporation violating any of the orders respecting any such mill or milldam made by the commission shall forfeit for each such violation a sum not exceeding five hundred dollars which may be recovered by civil action as provided by chapter 288. [1917 *c.* 474 *s.* 36; 1919 *c.* 702 *s.* 25; 1921 *c.* 422 *s.* 10] Annotated * †

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 482

FOX RIVER PAPER COMPANY
PATTEN PAPER COMPANY, Limited
APPLETON WOOLEN MILLS et al
Plaintiffs in Error

vs.

RAILROAD COMMISSION OF WISCONSIN
Defendant In Error

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

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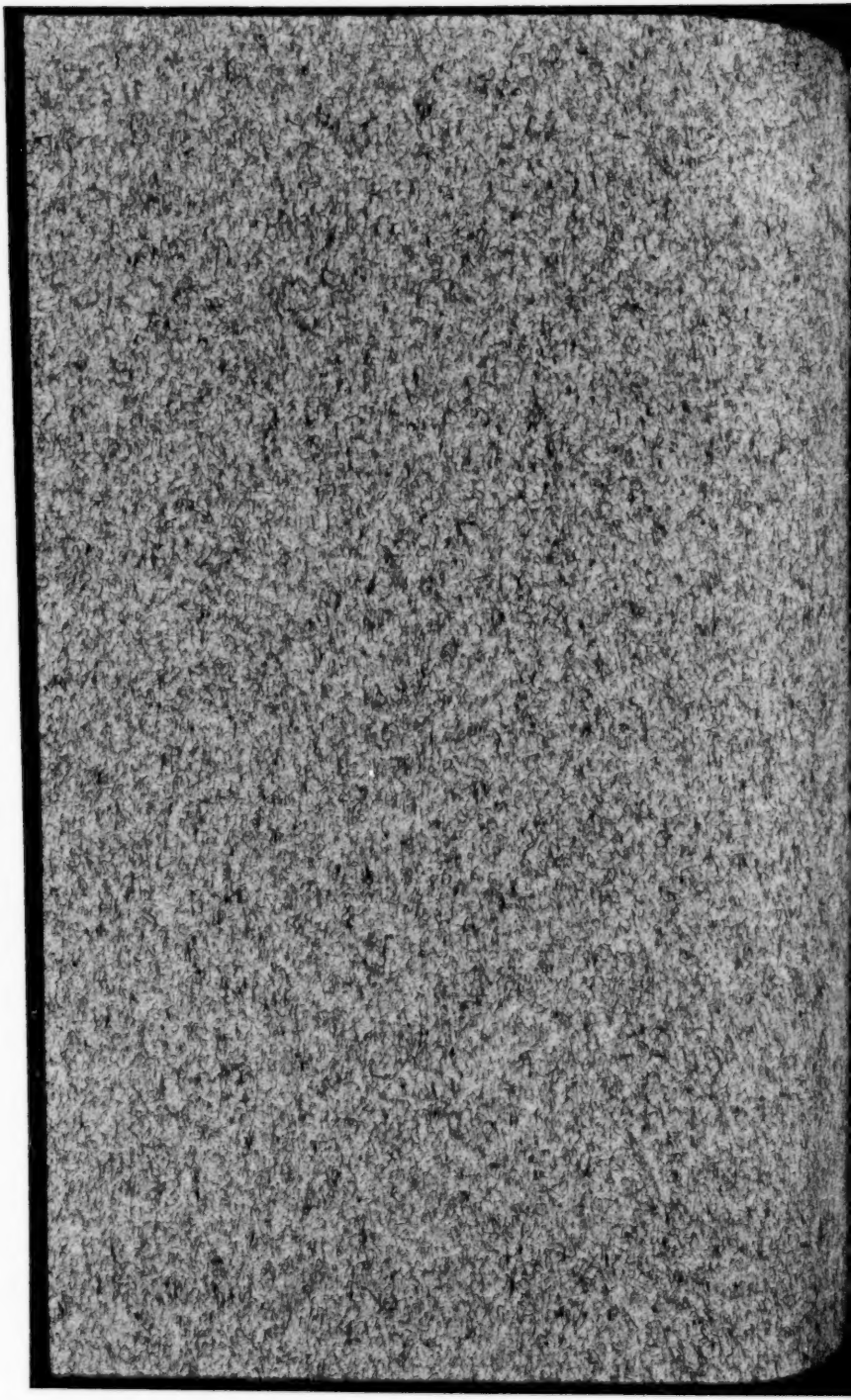

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Defendant In Error

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

In view of several propositions stated in plaintiffs' reply brief, and in order to supply the Court with the citations upon which part of the oral argument will be based, the defendant in error has concluded to submit this additional memorandum.

THE STATE IS WITHOUT POWER TO GRANT ANY PRIVATE PROPERTY RIGHT IN THE UNDEVELOPED POWER, BECAUSE BY DOING SO IT WOULD RELINQUISH A TRUST IT OWES TO THE POEPLE AT LARGE AND WOULD BE VIOLATING AN OBLIGATION IT OWES TO THE UNITED STATES GOVERNMENT.

The foregoing proposition has its foundation in the Ordinance of 1787, Art. IV, which provides that

"The navigable waters leading into the Mississippi and St. Lawrence Rivers and the carrying places between the same shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States."

The Fox River wherein this dam is situated is one of the "navigable waters leading into the St. Lawrence."

The obligation thus created was restated in the Wisconsin Territorial Act (5 Stat. at Large, 15, Sec. 12) and in the Wisconsin Enabling Act (9 Stat. at Large 57, Sec. 3). The National Government as early as 1846 granted uplands in Wisconsin to a corporation for the improvement of this "common highway" (9 Stat. at Large 83).

The duty to keep these "common highways forever free" was the trust which the State of Wisconsin assumed and which it could not relinquish. Re: Long Sault Development Company (242 U. S. 272, 279); Horicon Drainage District (136 Wis. 227, 237).

If the claims of the plaintiff in error are true, however, the State has divested itself of all power over the construction of dams except the police power. It cannot then refuse to grant a license to erect or maintain a dam when in its judgment such dam may interfere with navigation in the future. It can only say to the riparian owner—you cannot build a dam unless it is safe and can prescribe specifications for making it safe. If that is true, what has become of the trust which the State has assumed? If the right claimed exists, the owner of the site must have an absolute right to keep his dam in the waters and can prevent the State from requiring its abatement when the needs of navigation require; otherwise, where is the ripa-

rian's property right of which he is to be deprived? If he has not the right to prevent the State from abating the dam, the State in reclaiming the developed water power is not depriving him of anything. Suppose the plaintiffs are right and the Federal Government should say—this highway which is always to remain open for the benefit of the people at large must be improved in such a way as to eliminate this dam and that this action is taken within a year after the Wisconsin permit demanded by the plaintiff in error is granted, where is the property right alleged to have been acquired from the State? On the other hand, if the State has the power for a temporary reasonable period to give the plaintiff a right to use this development and this right will be recognized by the Federal Government as is indicated in plaintiff's brief on page 28 by the federal statute quoted, the State then surrenders a thing of value by assuring to the owner of the dam site the use of the power for a definite period and creates an additional value by agreeing to pay such owner for the development at the end of the period, instead of requiring him to abate the dam at that time. By doing so, instead of taking his property, the State is giving him something to which he is not of right entitled and in return therefor exacts an agreement from him to sell that particular part of the development which he contributed on a basis that is fair and equitable and at terms that are fixed at the time the permit is negotiated.

THE STATE HAS CARRIED OUT ITS TRUST OBLIGATION AND HAS NEVER SURRENDERED TO THE RIPARIAN ANY RIGHT TO THE UNDEVELOPED WATER POWER.

As early as 1840 by Act 9 of the Wisconsin Territorial Laws it was provided that

> "All rivers and streams of water in this territory in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States Government are hereby declared navigable to such an extent that no dam, bridge or other obstruction may be made in or over the same without the permission of the Legislature."

This statute was reenacted in 1849 and has continued in force ever since. By this act the power to erect dams was absolutely subject to the will of the Legislature. Again, in 1853, the provisions of Article IV of the Northwest Ordinance were declared as the policy of the State (Chap. 34, Laws of 1853, Sec. 1).

During the period from 1836 to 1909, 665 Special Acts of the Wisconsin Legislature authorized the construction of dams. Of this number 327 contained a reserve clause authorizing the Legislature to amend, alter or repeal the charter; 244 contained specific regulations for the improvement of navigation; 227 were for hydraulic purposes; 52 were for hydraulic and navigation purposes; 79 to facilitate log driving and navigation; 63 had varied provisions such as dams to feed canals, to create ponds and cranberry marshes; including 44 grants where no purpose is mentioned. (See Report of Committee on Water Power, Forestry and Drainage, Wis. Legis. 1910, Pt. 1, pp. 124 to 249, especially pp. 246 to 248.) Thus it would appear that not only did the State require permits before dams could be legally erected, but the owners of sites universally recognized that they had no right to construct a dam until such permission was given.

Originally a large part of these grants were in aid of lumbering, but by 1910 conditions had so changed that a distinct demand existed for a definite policy

with respect to future water power development and as a result of the comprehensive investigation above referred to, Chapter 652, Laws of 1911, was passed. The purpose of this law was to induce development of water power sites by giving a right to maintain the dam for a fixed period of time and also fixing the rights of the owner of the dam at the expiration of the permit. By doing so the public interests were protected without damage or injury to the private interests. This statute was declared unconstitutional primarily because it endeavored to make illegal dams which had been previously erected under legislative permission and permitted the appropriation of such dams by private persons for private uses, as is explained in the main brief.

Nor was this agitation for a fixed and definite policy of granting and regulating permits for such developments peculiar to Wisconsin. The United States Government, through its Water Power Commission, conducted a similar investigation beginning in 1909 and ending in 1912 and as a result of this investigation it reported that:

> "Nothing is more discouraging to the investment of capital than uncertainty. A grantee of the Government under this condition of grant (for a fixed period of time) might hope, if he endeavored to render the best service possible under the circumstances, that Congress at the end of the grant would be inclined to treat him fairly or even generously and that he would not be deprived of his property without compensation; but considering that it is a hope which involves the uncertainty of future policy, it is one not easy to capitalize. The only safe supposition is that the plant will be forfeited to the Government at the end of the period and on this basis the enterprise

must be financed. This means that provision for amortization of the plant must be made by the end of the fifty years. The business must earn during this time enough to pay all operating expenses, the annual interest on the investment, charges resulting from depreciation and obsolescence and in addition enough to repay the entire cost of the original plant, together with all improvements and additions, otherwise the entire enterprise is foredoomed to financial disaster. No company would accept a grant on such terms unless they were allowed to make such charges for the service or output as would enable them to meet all these financial obligations. When prevented by the regulations of some state commission or by competition with other forms of power from collecting such charges, no development will take place."—*United States National Water Power Commission.*—Final Report, p. 54.

Here again appears the public concern in extending the greatest inducement to water power development consistent with the imperative necessity for protection of the right of navigation, and the same committee concluded that:

> "The provisions for ousting a guarantee at any time on payment for the property is apparently intended to protect the Government against the emergency which would require the removal of a dam or other works because of an unforeseen contingency of navigation." (54).

This kind of legislation by the Federal Government was made necessary, moreover, by the refusal of the Presidents of the United States to approve special acts authorizing water power development unless they contained comprehensive plans for protection of the Government and for compensation to the Government

for the rights thus extended to the riparian owners. Congressional Rec., Vol. 48, p. 10318, Dixie Power Co., White River, Cotter (H. R. Doc. 899); Congressional Rec., Vol. 48, p. 11796, Coosa River Dam, Ala. (Sen. Doc. 949).

Following the decision the so-called water power cases, 148 Wis. 124, the Legislature in 1915 passed the present statute and eliminated therefrom the objectionable features referred to by the Court in these cases. It will be observed that the method prescribed by the statute furnishes to the water power owner definite assurance that he may have the use of the power for the period of 30 years, and that if the State desires at the end of that period to use the power and to develop the navigation, it must compensate him for the value of the improvements. If it does not desire to do so at that time, he may continue to use the development until such time as it will need the development. This policy insures to the water power owner compensation for his development which the State could seize upon for navigation purposes and require him to destroy if the permit were to run for but 30 years without such provision. Thus viewed, the statute does not deprive him of anything, but it insures him the compensation which the State is offering to pay voluntarily.

Rundle v. Delaware & Raritan Canal Co., 14 How. 80, 91, 92, 93, 94.

Estoppel.

It is urged by the plaintiffs in error that the Wisconsin Water Power Law is valid in all its provisions except as to Paragraph 3 of Section 31.09; that this paragraph alone is unconstitutional and void, and that

it is a separable or independent provision, so that the act as a whole must stand even if this paragraph falls; that inasmuch as the plaintiffs in error have offered to comply with the valid provisions of the act, that therefore they are not estopped from asserting the unconstitutionality of such parts of the act as are severable.

The provisions of the Wisconsin act are not separable but must be considered together. It is a well recognized principle that where various parts of an act are so related that the act forms an organic whole, portions of it will not be sustained unless it appears that the Legislature would have enacted them independently of the other portions of the act.

Huber v. *Martin*, 127 Wis. 412.
Bonnett v. *Vallier*, 136 Wis. 193, 196.
State v. *Hinkel*, 144 Wis. 444.

In *State* v. *Hinkel*, the court says (p. 450):

> "The various parts of this act are not severable into separate and complete regulations of any branch of the subject it embraces and hence cannot be upheld in part and rejected in part. Furthermore, it is obvious from the context of the act that the void parts of the act embrace the dominant purposes of the legislation and were the inducements to the enactment of the other portions. Under these circumstances the whole of the act must fall with the invalid portions."

It is obvious that the Legislature would not have enacted the law without the recapture provision. The Legislature was careful to limit the franchise of an applicant for permission to construct and maintain a dam under Section 31.05 or an application to legalize

a dam existing without legislative authority under Section 31.07 to a period of 30 years or for so much longer thereafter as the Legislature in its discretion may determine.

If the provision of recapture is held to be unconstitutional and the rest of the act stands, the franchise would be perpetual. The act confers broad powers on the Railroad Commission to protect public rights in the navigable waters of the State, even to the extent of regulating and controlling the level and flow of waters and the fixing of the maximum and minimum level for waters to be impounded in any dam. What the requirements of the public, with respect to its navigable waters, may be, after the lapse of 30 years, no one can tell. It is the policy of the State to fix a definite term for which a dam may be maintained instead of making the franchise terminable, as was the policy of the Federal Government prior to the Federal Power Act of 1920.

Moreover, the Railroad Commission is a fact-finding body. In order to confer jurisdiction under Section 31.05 or 31.07, two essential requirements must be complied with; namely, the applicant must file a written application with the Commission setting forth certain facts, and secondly, he must file with the Commission the proposal under Section 31.09. A failure in either requirement leaves the Commission without jurisdiction to act.

The plaintiffs in error on pages 16 to 19 of their reply brief cite state legislation pertaining to the sale of state lands and pertaining to the assessment of lands for taxation purposes. They say it appears that the legislature recognized the fact that water power adds value to the lands. With respect to non-navigable streams, the power capacity of the stream is a riparian

right and may be valuable. There are other rights pertaining to the upland which have value and should be taxed such as accessibility to the water, and to use the streams for various purposes not inconsistent with public rights.

The case of *Green Bay & Mississippi Canal Company* v. *The Kaukana Water Power Company*, 70 Wis. 635 (1888), is again referred to in the reply brief of the plaintiff in error on page 13 as supporting the proposition that the water power company is as against the state the owner of the water power.

If this be true, which we do not admit, then it is inconsistent with the decision in later cases, namely, *The Falls Mfg. Co.* v. *Oconto Co.*, 87 Wis. 134, 150, 151 (1894), where plaintiff's water power was greatly impaired without compensation because the State had improved the stream for navigation and in which case are cited with approval: *Cohn* v. *Wausau Boom Co.*, 47 Wis. 314 (1879); *Black River Improvement Co.* v. *La Cross, etc.*, 54 Wis. 659, 681, 682 (1882), discussed in brief for the defendant in error on pages 20, 21, and 22.

With respect to Chapter 374 (207-M), Laws of 1909, which provides that "in the sale of state lands the conveyance thereof shall be subject to the continued ownership of the state of all water power rights on such lands," we need only point out that by retaining the upland necessary for the dam site and flowage, the State having the right at any time to erect the dam or authorize a municipality or other person to do so, possesses a potential water power of value.

The Janesville Cases

Plaintiff cites *Janesville* v. *Carpenter*, 77 Wis. 288 (1887) in support of their contention that the State may not refuse permission to a riparian owner to erect a dam over a navigable stream. In *State* v. *Carpenter*, 68 Wis. 165 (1887) [These cases involve the right to drive piles in the bed of the Rock River at Janesville to support a building.] the Court held that the location of the Carpenter lot is between two bridges on piles without draws within 40 rods of each other; that dams and bridges span said river in the City of Janesville in many places which prevent the use of the river for navigation; that many buildings have been built into said river from abutting lots, and that such obstructions have existed for many years and that the building of the defendant would not materially obstruct such navigation as still exists.

The Court held that when anyone in good faith shall have the means of using said river for the legitimate purposes of navigation and shall desire so to use it for such purposes, it will be deemed time enough for him or the Attorney General to complain, and the courts of law will afford in such a contingency an ample remedy.

In *Janesville* v. *Carpenter* the city relied upon Chapter 423 of the Laws of 1886, which purport to give a cause of action for putting obstructions in the Rock River and "that any such obstructions might be enjoined at the suit of any resident taxpayer without proof that any injury or danger has been or will be caused by reason of the act." The Court held the act void for a number of reasons, particularly in this that the statute permitted a private individual to bring an

action to enjoin the riparian proprietor of the use of the bed of the stream, irrespective of whether any public or private rights had been invaded.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 492.—October Term, 1926.

Fox River Paper Company, Patten Paper Company, Limited; Appleton Woolen Mills, et al., Plaintiffs in Error,
vs.
Railroad Commission of Wisconsin.

In Error to the Supreme Court of the State of Wisconsin.

[May 31, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Plaintiffs in error are riparian owners of land bordering on the Fox River, a navigable stream. They own a dam at Appleton, Wisconsin, which has been maintained since its construction in 1878 without permission from any state authority. Since 1841 the statutes of the territory, and later of the state, have forbidden the building of a dam on any navigable river without legislative consent. Laws, 1841, No. 9; R. S. 1849, c. 34; R. S. 1858, c. 41, § 2; 1 Wis. Stat., 1898, c. 70, § 1596; 1 Wis. Stat., 1925, § 30.01 (2).

By § 31.02, Wis. Stat., 1925, the state railroad commission was given supervisory power over the navigable waters of the state, and control of the construction and maintenance of dams in navigable rivers. Section 31.07 authorizes it to grant permits to applicants to operate and maintain existing dams. By § 31.09 every applicant for a permit is required to file with his application proposals in writing, consenting, among other things, to the grant of a permit subject to the condition "that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equip-

ment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation."

Plaintiffs in error petitioned the commission for permits to maintain and repair their dam, which, they asserted, "does not materially obstruct navigation or violate other public or private rights or endanger life, health or property." The application was rejected by the commission solely for want of jurisdiction, since the applicants had omitted to file the proposals required by § 31.09. Plaintiffs brought suit in the nature of a mandamus proceeding in the circuit court of Dane County, Wisconsin, to compel the commission to take jurisdiction of the application and to proceed to a hearing. The bill drew in question the validity of § 31.09 under the due process clause of the Fourteenth Amendment, alleging that the determination of the commission acting under the statute operated to deprive plaintiffs of their property without due process of law. The commission answered, admitting the allegations of fact of the bill, setting up that plaintiffs' dam had been constructed and was maintained without a permit from the state, and that the application had been dismissed for want of jurisdiction. The trial court gave final judgment on the pleadings for defendant in error, upholding the validity of this act. The Supreme Court of Wisconsin affirmed by an evenly divided court. 189 Wis. 626. The case is here on writ of error. Jud. Code, § 237 (a), as amended.

The right set up in the bill is one under the Federal Constitution. Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this Court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law. Cf. *West Chicago R. R.* v. *Chicago*, 201 U. S. 506; *Ward* v. *Love County*, 253 U. S. 17, 22; *Chicago, Burlington and Quincy Ry.* v. *Drainage Commissioners*, 200 U. S. 561; *Appleby* v. *City of New York*, 271 U. S. 364, 380.

Plaintiffs' case rests on the contention that by the law of Wisconsin the rights vested in riparian owners include the right to use the water power and for that purpose to dam the river, subject only to the exercise by the state of its police power to regulate the use of navigable waters in the public interest, and to protect public health and safety; that to withhold from plaintiffs, as the state does under the statute, the right to use their own property unless they agree to surrender it to the state at a price which may prove at the time of transfer to be less than its true value, is a taking of property without due process, prohibited by the Fourteenth Amendment.

We do not pass upon the sufficiency of the compensation provided for by the statute. For the purpose of decision, it may be assumed that the recapture provisions go too far, if the rights of plaintiffs are as described. Hence the point first to be determined is whether plaintiffs' description is accurate. The trial court, the only state court to express an opinion on this question, held that the right of the riparian owner to make use of the water power in a navigable river by maintaining a dam is subordinate to the plenary power of the state to regulate the use or obstruction of navigable waters; that the state may forbid all obstruction by dam or otherwise; hence, the right of the riparian owner to develop water power by the construction of the dam remains inchoate until the state has given its consent. "If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may grant such permission upon such terms as it shall determine will best protect the interests of the public. The legislature could impose the condition that the dam should be removed when it obstructed navigation or that it should be removed at the end of a definite period of time, for example, thirty years."

There being no question of evasion of the constitutional issue, *Nickel* v. *Cole*, 256 U. S. 222, 225; *Union Pac. R. R.* v. *Public Service Commission*, 248 U. S. 67; *Ward* v. *Love County*, *supra*, 22; *Long Sault Development Co.* v. *Call*, 242 U. S. 272, this Court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law. *Sauer* v. *New York*, 206 U. S. 536; *Kaukauna Co.* v. *Green Bay, &c. Canal*, 142 U. S. 254, 272, 277. Although presumptively title to the soil under navi-

gable waters within the state is in the state, *Massachusetts* v. *New York*, 271 U. S. 65, 89; *United States* v. *Holt State Bank*, 270 U. S. 49, 54, the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state. *Kaukauna Co.* v. *Green Bay, &c. Canal, supra*, 272; *Packer* v. *Bird*, 137 U. S. 661, 669; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Barney* v. *Keokuk*, 94 U. S. 324, 338. If the state chooses to resign to the riparian proprietor sovereign rights over navigable rivers which it acquired upon assuming statehood, it is not for others to raise objections. *Barney* v. *Keokuk, supra*, 338. We assume, although judicial expression is not entirely consistent, that by the law of Wisconsin, in the absence of special circumstances, title to the bed of navigable rivers is in the riparian owner. *Kaukauna Co.* v. *Green Bay, &c. Canal, supra*, 272; *Willow River Club* v. *Wade*, 100 Wis. 86, 95; *Wisconsin River Improvement Co.* v. *Lyons*, 30 Wis. 61; cf. *Merwin* v. *Houghton*, 146 Wis. 398, 409. But defendant contends that in any case the rights of plaintiffs are subordinate to the state control of navigable waters, and as was held in effect by the state court in this case, the riparian owner can have no right in the water power created by damming a navigable river, so long as the state withholds its consent to the construction or maintenance of the dam. *Wisconsin River Improvement Co.* v. *Lyons, supra*, 67.

In so holding it does not appear that the court below ran counter to any established rule of property of the state. An examination of the earlier state decisions discloses no such conflict of authority or inconsistency of judicial opinion on this subject as even to suggest that the court below adopted its view in order to evade the constitutional issue. *Nickle* v. *Cole, supra*. The state's consent is necessary for the construction of a bridge or dam in a navigable river, subject to the superior power of the United States over navigation, *Barnes* v. *City of Racine*, 4 Wis. 474; *Wisconsin River Improvement Co.* v. *Lyons, supra;* and plaintiffs concede that the maintenance of a dam without such permission constitutes a public nuisance. 1 Wis. Stat., 1925, § 31.25; cf. *In re Eldred*, 46 Wis. 530. Riparian use is subject also to the public right of navigation, *Cohn* v. *Wausau Boom Co.*, 47 Wis. 314, 325; fishing, *Willow River Club* v. *Wade, supra;* and possibly to the right to

establish a public water supply by damming the river. Cf. *Wisconsin* v. *City of Eau Claire,* 40 Wis. 533. That the holding below presents no novel view appears from the opinion of the Supreme Court of Wisconsin in the *Water Power Cases,* 148 Wis. 124, where the court specifically pointed out (p. 149) that neither the riparian owner nor the state could develop water power by placing a dam in a navigable river resting upon its banks without the consent of the other, and that the state might withhold its permission or grant it on conditions. Cf. *Black River Improvement Co.* v. *LaCrosse Co.,* 54 Wis. 659; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53.

We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. *Sauer* v. *New York, supra.* It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.

We accept as conclusive the state court's view of the nature of the rights of riparian owners. We therefore find in the refusal of the commission to grant the permit no denial of the property rights of plaintiffs and hence no violation of the Fourteenth Amendment. Compliance with § 31.09 is the price which plaintiffs must pay to secure the right to maintain their dam. Cf. *Booth Fisheries* v. *Industrial Commission,* 271 U. S. 208.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.